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IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

B. A. & L. D. HOLLAND COM-  
PANY, a corporation, *Appellant*,

*vs.*

NORTHERN PACIFIC RAILWAY  
COMPANY, a corporation,

*Appellee.*

GEORGE TURNER and BERTHA  
TURNER, husband and wife,

*Appellants*,

*vs.*

NORTHERN PACIFIC RAILWAY  
COMPANY, a corporation,

*Appellee.*

H. J. SHINN and PHOEBE SHINN,  
husband and wife, *Appellants*,

*vs.*

NORTHERN PACIFIC RAILWAY  
COMPANY, a corporation,

*Appellee.*

W. H. KIERNAN and CHRISTINE  
B. KIERNAN, husband and wife,

*Appellants*,

*vs.*

NORTHERN PACIFIC RAILWAY  
COMPANY, a corporation,

*Appellee.*

BRIEF OF APPELLEE.

*Upon Appeals from the United States District  
Court for the Eastern District of Wash-  
ington, Northern Division.*

C. W. BUNN, St. Paul, Minn.,  
E. J. CANNON,  
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Spokane, Wash.,

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NOTE: There is too much accentuation on the one hand, and too much slurring on the other, to permit our acceptance of complainants' statement

of the case as an accurate reflection of the case made by the evidence. The evidence, however, cuts so small a figure in the decision of any question presented, and is so utterly irrelevant to the principal questions involved, that we shall attempt neither correction nor ampler statement here, but will leave such matters for a subsequent portion of the brief, first taking up those points which are purely legal in character, and in the order in which they are discussed by counsel for the complainants.

## I.

### *The Source and Quality of Title to the Land Within the Boundaries of Railroad Street.*

Briefly stated, the first position assumed by complainants' counsel is this: The title to the right of way granted by section two of the Northern Pacific Land Grant Act is a base fee, subject to reversion, and inferior to the title passing under the aid grant contained in section three of the act. When the two titles meet, as when the right of way is located across an odd numbered section, the inferior, the right of way grant title, merges in the superior, the aid grant title, and thereby loses all the incidents which it pos-



sesses where it does not come in contact with the aid grant title. For the case at bar, it is said that as the tract in controversy is within an odd numbered section, it was acquired under the aid grant, although it is a part of the right of way, and therefore the Northern Pacific Railroad Company was at liberty to dispose of it as it chose, just as it could of any other land acquired under the aid grant.

There are two grants, it is true, contained in the Northern Pacific grant act, and the two may coincide, as here, where the right of way lies across an odd numbered section to which no rights of third parties have attached prior to the filing of the map of definite location. But the conclusion which complainants' counsel draw from the fact is a most patent *non sequitur*.

The corner stone of their argument, that the right of way title, passing under the right of way grant, is inferior to the title to the aid lands, passing under the aid grant, is palpably unsound. The right of way title is the prime, the superior title, and if under such conditions as are here present, there is a merging of an inferior in a superior title, the title under the aid grant merges in the title under the right of way grant to the whole right of way.

Just what are the incidents and dissimilarities in the two titles in question? It was held by the Supreme Court in *Railroad Company v. Baldwin*, 103 U. S., 426, *Bybee v. Railroad Company*, 139 U. S., 663, *Railway Company v. Hasse*, 197 U. S., 9, and *Stuart v. Railroad Company*, 227 U. S., 342, and by this court in *Nielsen v. Railway Company*, 184 Fed., 601, that two titles were contemplated by the act, one to the right of way lands and one to the aid lands, and the dissimilar incidents of the two which were essential to the decision of the questions presented in those cases were pointed out. Thus it was said in the *Stuart Case*, *supra*:

“In this connection it is to be remembered that the grant of the right of way differed from the grant of alternate odd-numbered sections in that, while both were expressed in the words of a grant *in praesenti*, the former was without limitation or exception, while the latter was expressly made subject to the limitation or exception that it should not include any lands which, although public at the date of the grant, were sold, reserved or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had attached, at the date of definite location. Of such a difference between an unconditional grant of a right of way and a qualified grant of alternate odd numbered sections this court said, in *Railroad Co. v. Baldwin*, 103 U. S., 426, 430: ‘The uncertainty as to the ultimate location of the line of the road is recognized

throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. We see no reason, therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road.' ”

A more vital distinction, so far as this case is concerned, is pointed out in *Smith v. Railroad Company*, 171 U. S., 275, and *Railway Company v. Townsend*, 190 U. S., 267, and is this: When title vests under the aid grant it is absolute, and the grantee may dispose of the granted land as it chooses. The title which vests under the right of way grant is not absolute, and the grantee must retain the granted land for railroad purposes, and may not dispose of or encumber it without the consent of Congress. To quote from the *Townsend case*:

“But, although there was a present grant, it was yet subject to conditions expressly



stated in the act, and also (to quote the language of the *Baldwin* case, 'to those necessarily implied, such as that the road shall be \* \* \* used for the purposes designed.' Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Congress, then, made two grants, each as entirely independent of and dissociated from the other as though between two private parties separate tracts of land had been conveyed by separate deeds containing dissimilar covenants and conditions. Apart from the distinctions in the nature and quality of the titles conveyed by the two grants which are noted in the foregoing decisions, others suggest themselves to the mind, and these, with those above noted, all convince that right of way grant title and aid grant title are two dis-

inct entities, merger between which, so that the right of way title shall sink in and be extinguished by the aid grant title, is impossible without express Congressional permission. Some of the additional distinctions which occur are these:

Right of way grant and aid grant alike are *in praesenti*. But so far as the title to specific land is concerned, the right of way grant is first in time and is the base from which the aid grant is fixed. Not until the right of way has become fixed and certain; not until, consequently, title to the certain, definitely described lands within the right of way has become vested under the right of way grant, may title vest under the aid grant, for it is not until the right of way is fixed that it may be ascertained what lands are within the aid grant and will pass under it. The right of way title is therefore first in time and importance.

The right of way grant is of the particular; the aid grant of the general. The first conveys title to a certain, definitely ascertained strip of land across the public domain upon which the railroad is or is to be constructed. The second is dependent for its operation upon the first, and conveys title to such parcels of land referred to in the act as may be found within a certain distance on each side of the right of way when it

is located, and which may not, at the time of such location, be affected by the interest of third parties.

The right of way title across an odd-numbered section is superior to the aid title to the whole section because it is absolute (if the section was public land in 1864); the aid title is conditional. Thus for the case at bar, if some one had settled upon section 19 intermediate the date of the grant and the date of filing the map of definite location under the general land laws of the United States, his rights, howsoever good they otherwise were as to the remainder of the section, would be valueless with respect to the right of way. The settler's title, in other words, would be superior to the railroad's aid title, but inferior to its right of way title.

The right of way is granted that the grantee may construct its tracks upon it, and so bring into existence that which is the consideration for the aid grant. The aid grant is a bonus given as an inducement for the acceptance and use of the right of way.

The aid grant purposes that the lands granted thereby shall be sold and the proceeds of the sale devoted to the better enjoyment and utilization



of the right of way grant. The lands covered by the right of way may not be sold, but must be retained and devoted to the purposes for which they were granted.

So much for the distinctive features of the two titles; features which preclude thought of merger between the two and the consequent extinguishment of the marked characteristics which Congress impressed upon the right of way title for the furthering of the Congressional intent. Look now at the question of the merger of the right of way title where the right of way crosses an odd numbered section from the standpoint of mere reasonableness.

The right of way is granted "through the public lands"; "on each side of said railroad where it may pass through the public domain." There is no exception, reservation, or limitation; no distinction between the grant over odd numbered sections and over even numbered sections. It is an entire grant "through the public domain." Looking only to the granting words, the trial judge was clearly right when he said that "The grant of the right of way is an entirety and is held throughout by the same tenure and subject to the same limitations." To read exceptions into the grant, distinctions between the grant across

odd numbered and even numbered sections, would be not only to do violence to Congressional language but to impugn Congressional reason. It was said in the *Smith Case* (171 U. S., 275) and the *Townsend Case* (190 U. S., 272) that "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance," and it was therefore held that it was beyond the power of the railroad company to alienate any portion of its Congressionally granted right of way. We suppose it must be accepted that the Supreme Court perfectly apprehended the Congressional intent and correctly construed the Congressional language. So accepting, when we in addition endeavor to accept as sound the theory which counsel here posit, this situation results: Congress, after careful consideration, determined that a right of way four hundred feet in width across the public domain was necessary for a public work of such importance as the Northern Pacific railroad, and in granting such right of way did so upon the implied condition that the grantee should retain all the granted strip for right of way purposes, whether needed at the outset or not, and should be incapable of alienating

any part of it. But though using unrestricted language, apparently as applicable to the grant of a right of way across the public domain in an odd numbered section as in an even numbered section, in fact Congress did not consider or determine what width of right of way would be necessary across the odd numbered sections in the public domain, and so placed no implied condition upon its right of way grant across those sections. The Northern Pacific Company must therefore keep unimpaired its four hundred foot right of way across even numbered sections, but may whittle away at its right of way in the odd numbered sections on either side of each even numbered section until it has bare single trackage room, or nothing at all if it chooses, remaining for right of way purposes.

Respect for Congressional intelligence demands, we think, that it be held there is error somewhere; that either the Supreme Court erred when it declared in the *Smith* and *Townsend Cases* that Congress considered and determined what right of way was necessary across the public domain, or else that complainants' counsel err when they postulate a theory which is self evidently fallacious unless it be said that Congress confined its consideration and decision to the portions of the

public domain falling within the boundaries of even numbered sections.

We are told in support of counsel's theory that the aid title is superior to the right of way title that on the odd numbered sections the aid grant took effect first; that the filing of the maps of definite location did not fix the location of the right of way so that title to it would pass under the right of way grant; that until there was actual construction on the line of marked location the right of way was but a "beneficial easement, having no precision," and, consequently, title to the right of way did not pass under the right of way grant until there was "actual occupancy for purposes of construction." It is said that the aid grant stands on an entirely different footing; "That attains precision at the moment of filing the map of definite location." Therefore, it is thought, when the railroad company platted Railroad Addition it "had full fee simple title to section 19 \* \* \* under the grant in aid, while its right of way was still a float, still a mere beneficial easement without precision. The full fee had vested under the grant in aid before there was an opportunity for the base fee of the right of way to attach."

The ordinary mind finds it difficult to follow



this course of reasoning, and, that feat achieved, is quite incapable of appreciating its soundness. There is a prevailing impression among the mere ordinary that a stream cannot rise higher than its source, and that a structure cannot be erected until there is a base constructed for it to rest upon. The aid grant is fixed with reference to "the route of said line of railway," and is of certain sections of land "on each side of said railroad line," not subject to prior claims "at the time the line of said road is definitely fixed, and a plat thereof filed," etc. Obviously the aid grant does not pass title to any specific land until there has first been a fixing of the right of way, and quite as obviously when the right of way is fixed title to it instantly vests under the right of way grant. Plainly the right of way grant is the base upon which the aid grant rests.

Neither can the ordinary mind comprehend how that which is without precision, definiteness, or certainty, a "float" which may settle anywhere or merely continue to float, can be the measure for and delimit that which is precise, definite and certain. Yet counsel argue with apparent gravity that the right of way delineated on the map of definite location, though but a nebula which requires time and the actual construction of a road-

way to give it form and fix its place, was of sufficient substance and certainty of location to serve as the base upon which the aid grant must rest; as the fixed center from which the boundaries of the aid grant might be ascertained.

While reason somewhat totters under such vigorous assaults upon it, the valiancy of counsel's attack upon reason is nothing as compared to their onslaught upon authority. Say they: "It is only the actual final survey, followed by actual occupancy for purposes of construction, that gives the right of way precision, and causes it to relate back. Prior to that time it is only a present beneficial easement, having no precision." That statement will only be the law in this jurisdiction when the decisions of this court and of the Supreme Court are overruled by some higher power.

In *Missouri etc. Co. v. Cook*, 163 U. S., 491, it was said:

"We think that by the filing of the map of the line surveyed the route was definitely fixed, within the intent and meaning of the act, and while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate, to definitely locate the line and limits of the right of way. And this view is sustained by previous adjudications of this court."

Commenting upon *Van Wyck v. Knevals*, 106 U. S., 360, where it was held that the filing of the map of definite location in and of itself definitely fixed the route of the railroad and thereby fixed the land to which it was entitled under the aid grant, the court said further:

“The same conclusion necessarily followed in respect of the right of way. The grant of the lands and the grant of the right of way were alike grants *in praesenti* and stood on the same footing, so that, before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right of way for the proposed road. The easement and the lands were a float until by definite location precision was given to the grant and they became permanently fixed. *Railroad Co. v. Baldwin*, 103 U. S., 426.”

The same rule was declared by this court in *N. P. R. Co. v. Murray*, 87 Fed., 648, where it was said:

“The first question to be considered is whether the grant of right of way is fixed by the location of the road, as constructed, without reference to variations of such location from that shown by maps filed in the land office by the grantee company. If so, the company has a right of way, effective by relation from July 2, 1864, the date of the granting act, and has priority over the title under which the defendant in error claims. By section 3 of the granting act, the grant becomes definite when the line of road is defi-

nately fixed, and a plat thereof is filed in the office of the commissioner of the general land office, so that the limits of the grant become fixed when the line of route is thus located. In this case such line was established by a map of definite location filed in May, 1884, nearly 20 years after the granting act was passed. It is undisputed that the right of way, as thus ascertained, was vested in the company as of the date of the act of congress, and it does not follow the line of construction where that deviates from the line of such location. *Smith v. Railroad Co.*, 7 C. C. A. 397, 58 Fed. 513. It is conceded that the route must be considered as definitely fixed when its map of location is filed, upon the authority of decisions of the Supreme Court of the United States, where the question related to the limits of land grants, but it is sought to distinguish the question thus presented from that arising in this case. As to this, the Circuit Court of Appeals for the Eighth Circuit, in the case cited, says:

‘But it is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed, under the act of congress, by filing its map of definite location, and yet be subject to another and subsequent definite fixing, on a different line, by its actual construction; for this is simply to say that a line which is ‘definitely fixed’ is indefinitely changeable. Nor is it perceived how this act of congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant, and another and a parallel line for the purposes of its right of way.’

Every consideration upon which the land-grant companies are held to the lines of loca-



tion designated in maps filed for that purpose by them, when the question was with reference to the grant of lands, applies equally in cases involving rights of way. The company makes its own selection of route, and it takes its own time in doing so. It is not concluded by any survey and selection it may make. As stated by the court in *Land Co. v. Griffey*, 143 U. S. 32, 12 Sup. Ct. 362:

‘It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the government knowledge of its selected line, is it concluded by its action.’

It is argued in this case that there is nothing in the act of congress that required the company to file a map of definite location; that the failure to do so simply had the effect to extend the time within which interests in lands within the limits of the grant might vest in others. This may be true, and, if so, it was open to the company not to signify its location of route by this method. It might have indicated its route by the construction of its road. But by whatever means it chose, if it had choice of methods, to signify its adoption of a line of route, when it had formally announced its selection the limits of its grant became fixed for all purposes.”

There is, of course, no distinguishing the above decisions, and so it is clear that while a right of way line *may* be fixed by actual construction where no map of definite location has been filed, yet where such a map has been filed it is the highest

and best evidence of the location of the line, and is conclusive thereupon. Where no map of definite location was ever filed, the courts have permitted evidence to be given of a definite location by actual construction. They have permitted such evidence, however, only because the necessity of the case demanded it, and any evidence of that character would give way to the higher and better record evidence made by the filing of a map of definite location. Referring to former rulings of the land department relative to what would constitute the definite fixing of a railroad route by indicia upon the ground, it was said in *Tarpey v. Madsen*, 178 U. S., 215:

“This unfortunate uncertainty and instability of title continued until the decisions of this court in *Van Wyck v. Knevals*, 106 U. S., 360, and *Kansas Pacific Railway Company v. Dunmeyer*, 113 U. S., 629, the first decided in October, 1882, and the latter in March, 1885. By those cases it was settled that the time at which the title of the railroad company passed beyond question was that of the filing of an approved map of definite location in the office of the Secretary of the Interior. This eliminated all oral testimony, and established a date at which, by record, the title of the railroad company should be considered as definitely ascertained.”

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The feature of the right of way title most relied upon as decisive of its baseness is its non-alien-

ability. The statement in the *Townsend Case* that "In effect the grant was of a limited fee" is quoted, and we are told, with much citation of Blackstone to establish the delicate point, that a limited fee is a base fee, that a base fee is not of so high a quality as a fee simple, and consequently that the base fee of the right of way grant merged in the fee simple of the aid grant whenever the two met.

We shall not pretend to equality in the learning here displayed. Neither shall we be so exacting as to expect consistency from counsel, and inquire why it is, if it be true as asserted on page 63 of complainants' brief that "the learning on the subject has but little, if any, place in the law of today" in distinguishing between exceptions and reservations, the rule does not hold equally good with respect to other rules of common law conveyancing. We steer clear of all such perplexing questions because we are unable to see how the learning of Blackstone can be of any aid in construing a modern railroad land grant. It would be much more reasonable to cite Stephens' Pleading and Tidd's Practice as authoritative upon questions arising under our modern codes of procedure. The Northern Pacific land grant was made by Congress to secure the performance of

a public work of great importance. To that end it made two grants and provided for two titles, ascribing to each such attributes as seemed best fitted to secure the results desired therefrom. It granted lands for a right of way, purposing that the railroad should be constructed and maintained thereon. It granted lands adjacent to the right of way, purposing that they should be sold and their proceeds used in aid of the construction and operation of a railroad upon the right of way granted. It denied to the grantee power to dispose of the lands granted for right of way, for to permit it to dispose of such lands at its pleasure might thwart the purpose of the grant. It gave to the grantee unlimited power of disposition of the aid lands, for to deny such power might thwart the purpose of that grant. Denial of the power to alienate no more stamped the right of way title with inferiority than the fact that the right of way title related back to the date of the granting act, cutting off all intervening rights of third persons, while the aid title, while relating back for some purposes did not cut off such intervening rights, stamped the aid title when it did vest with inferiority. All that can be said of the differing incidents is that Congress for the better effectuation of its purposes saw fit to endow



one title with certain attributes and the other title with certain other attributes. Each title within its limits, for its purposes, and with its incidents, is of equal quality with the other. The purpose of Congress in making a separate grant of the right of way and rendering the granted land inalienable is both apparent and established by authority, and obviously such purpose would be thwarted by calling the right of way title inferior and declaring its merger in the aid title when the two meet in an odd numbered section. To search for analogues among medieval estates and draw supposed analogies therefrom instead of exercising reason in arriving at the Congressional intent, is to go wool-gathering to ascertain a meaning instead of using common sense in the search.

It would seem quite clear, too, that if one title must merge in the other on odd numbered sections across which the road is constructed, the aid title is the one marked for submersion within the limits of the right of way. At the time of the enactment of the granting act, the projected route of the Northern Pacific lay for substantially its whole length through the public lands. Private ownerships were very few and far between. Congress granted a comparatively narrow but continuous strip for a right of way across the entire

public domain. To aid in the construction of a railroad on the right of way granted, it granted an empire on each side thereof. It was of immeasurably greater importance in the Congressional plan for this vast public improvement that the practically continuous strip it had granted across the western half of the continent for right of way purposes should be retained intact for such purposes, than that the company might be able to realize a very few more dollars from its aid grant by virtue of power to sell the few odd numbered sections across which the railroad might be constructed unencumbered by the right of way title.

The thought just adverted to may be put in another way. Complainants are seeking the aid of a court of equity to establish a merger of titles. In an action at law, had they established a meeting of a greater and lesser estate, merger would have been declared. But

“In equity, the rules of law as to merger are not followed, and the doctrine of merger is not favored. Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties. Wherever a merger would operate inequitably it will be prevented. The controlling consideration is the intention, expressed or implied, of the person in whom the estates unite, provided the intention be just

and fair, and a merger will not be permitted contrary to such intent."

16 *Cyc.*, 665.

Stated more strongly

"Merger is not favored in equity, and is never allowed, unless for special reasons, and to promote the intention of the party."

4 *Kent's Comm.*, p. 102.

When dealing, as here, with a public grant, made to secure a great public improvement, a different element enters into the situation. In conveyances between private parties, the intent and interests of the grantee are alone to be considered. Here the intent and interests of the grantor are the dominant factors, for the grant was a benefaction, made in order to secure the performance of a public work which Congress, as the representative of the whole nation, desired. The grant, in particular of the right of way, was hedged about with such limitations as Congress deemed necessary in order to secure the performance of the work. The principal limitation upon the right of way title was that the grantee should be incapable of surrendering its ownership and control of and over the right of way, for to permit it to do so might render it impossible for it to perform the desired work. To quote from another portion of the *Townsend* opinion:

“To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company.”

Not reasonably may there be imputed to Congress an intent when granting a right of way across the entire public domain lying in the path of the road, that upon each alternate section the right of way title, granted for the purpose and with the limitation above stated, should merge in the aid title, so that the grantee might dispose of its right of way as it chose, even though thereby “the obligations to the United States assumed in the acceptance of the act” might *not* be performed.

Picking up some stray threads in counsel’s argument to conclude this head:

Referring to the separate nature of the right of way grant on the authority of *Railroad Company v. Baldwin*, the trial judge said in the opinion of dismissal:



“The grant of the right of way is an entirety and is held throughout by the same tenure and subject to the same limitations.”

Apparently counsel suppose that when the learned judge said “entirety” he meant “continuity,” and that when he spoke of the “grant of the right of way” he meant not merely the right of way granted by the United States, but also such as it might be necessary for the railroad company to acquire from private ownership by purchase or condemnation. On the basis of that notion, they very satisfactorily convict the judge of gross error in the quoted statement. Possibly the setting up of straw men for the successful demolition which their quality ensures is a pleasing occupation, but it is scarcely profitable. The trial judge spoke, of course, of the right of way granted by Congress across the public domain, and meant that such grant was not interrupted by section lines, but was held by the same tenure and was subject to the same limitations across odd numbered sections that it was across even numbered sections. The language of the grant permits no other construction.

While a pleasant field for speculation is opened by counsel’s cogitations concerning the effect upon the right of way title had the road been con-

structed upon the south half of section 19 after the map of definite location had fixed its situs on the north half, we must decline to wander in it. With equal profitableness one might speculate upon the effect upon both right of way title and aid title of a change 100 miles to the south of section 19, an abstract question the Supreme Court has twice declined to answer (*Van Wyck v. Knevals*, 106 U. S., 369; *Missouri etc. Co. v. Cook*, 163 U. S., 498), and has committed itself no further than to say in *N. P. R. Co. v. Smith*, 171 U. S., 268, that "only the United States could complain of the act of the company in changing the location of its tracks from that previously selected." We might conjecture that if the supposititious change had been made the United States could have declared a forfeiture of the right of way grant, or if it failed to take such action, that the land contained therein might have passed by a conveyance of the whole section. We are dealing with a right of way not abandoned for right of way purposes, but actually built upon and used for railroad purposes, and speculations as to where the title to a right of way selected by the filing of a map would vest if the company should subsequently build elsewhere are of no aid in determining whether, when selected and occupied,

the title to the right of way is held under the right of way grant or the aid grant.

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To repeat, Congressional intent is decisive of the question involved. Every other consideration gives way to that. No aid in arriving at such intent can be obtained by attempting to apply obsolete conveyancing terms and rules to the Congressional grants. Upon authority and from reason it is plain that the prime grant contained in the Northern Pacific act was that of the right of way. It was given to assure, so far as Congress could assure, an unbroken line of communication, of abundant width for railway purposes, from Lake Superior to Puget Sound. To make sure that its bounty should not be misused and its purpose thwarted, Congress forbade the alienation of any part of the right of way or its diversion to other than railway uses. To further its purpose in the making of the right of way grant, it made the aid grant, a contingent grant, the boundaries of which were to be located from the right of way grant when it should be located, and the lands in which were to be sold to aid in the construction of a railroad on the right of way. The mere statement of these undeniable facts convinces that Congress did not intend the aid grant to be the superior

title, in which the right of way grant would merge where the right of way crossed an odd numbered section, so that the grantee might dispose of its right of way across each such section at its pleasure. To provide for this would be to break up the entirety of the grant, and render useless the precaution which admittedly Congress took with respect to even numbered sections of forbidding alienation or diversion of the right of way thereacross in order that the continuity of the railroad line might not be imperilled. To ascribe to Congress an intelligent and definite policy with respect to the right of way across even numbered sections; and an entirely different policy or utter want of policy with respect to the right of way across odd numbered sections, is to convict Congress of incredible stupidity. Hardly should this be done on the strength of a little archaic learning on the subject of ancient estates.

## II.

### *Power of the Railroad Company to Dedicate Railroad Street.*

The main track of the Northern Pacific Railroad Company, as shown on the map of definite location and as actually constructed and always thereafter and now maintained, lies in the center of



Railroad Street as platted. Railroad Street, consequently, being 225 feet in width, occupies the heart of the original right of way of the Northern Pacific, only a comparatively narrow strip of the original way bordering it on either side. Moreover, the company had sold those bordering strips prior to the act of 1904 validating such conveyances of the right of way, so that it now retains nothing for its right of way but Railroad Street, under the proviso of that act "that no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained." And the question is whether it was within the power of the railroad company to dedicate what is now its entire right of way as a street.

At the outset of their discussion of this question, complainants' counsel, admitting that an attempted conveyance of any part of the right of way for private purposes would have been a nullity under the *Townsend Case*, seek to remove the dedication of Railroad Street from the operation of the rule there declared upon the ground that the dedication was a conveyance for public purposes, a thing not forbidden by the granting act. Putting this plan for evading the rule in the

most plausible form in which their art can present it, it is argued that "so far as necessary public uses are concerned," it is impossible to discriminate "between a cross street and a longitudinal street" in the use of the right of way for street purposes; that use of the right of way for highway purposes is as much a public use as for railway purposes; and that there is no question of disabling the railroad company from performing its public functions but only of its "mere present convenience and advantage."

The real question presented here cannot be so blinked. No amount of quibbling and evasion can disguise and prevent it being seen in the naked form in which it must be answered.

If the Northern Pacific right of way through the heart of the business portion of the City of Spokane has been dedicated as a street, then a street it is, with each and every incident and attribute of each and every other street in the city, to its full width (since the validating act of 1904) of 200 feet. There is no such conundrum as: "When is a street not a street?" Under the laws of Washington, Railroad Street is either a public highway, with all the incidents attached thereto, or else it is the right of way of the railroad company, held in the same manner and for

the same uses as the remainder of its right of way. There is no middle ground.

The statutes of Washington provide:

“Whenever any city or town has been surveyed and platted, and a plat thereof showing the roads, streets, and alleys has been filed in the office of the auditor of the county in which such city or town is located, such plat shall be deemed the official plat of such city or town, and all roads, streets, and alleys in such city or town, as shown by such plat, (shall) be and the same are declared public highways: Providing, that nothing herein shall apply to any part of a city or town that has been vacated according to law.”

*2 Rem. & Bal. Code, §7835.*

“All streets declared public highways under the provisions of this and the last preceding section shall be under the control of the corporate authorities of the respective cities.”

*Ibid, §7837.*

“Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be considered, to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees, for his, her, or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid.”

*Ibid, §7853.*

The rule with respect to street dedications is:

“An owner may grant whatever estate he sees fit, and may annex conditions and limitations to his grant at his pleasure, provided that such limitations and conditions are not inconsistent with the dedication and will not defeat the operation of the grant. A condition or limitation which would render the dedication ineffectual cannot be annexed: thus, a man cannot reserve possession to himself, nor reserve a right to do anything in the way which will destroy its character as a public way. Nor can there be a valid dedication to a part only of the public, since this would be repugnant to the purpose of the dedication, and by limiting the right to use the way to designated individuals or classes of persons, the general public would be excluded, and this would render it impossible for the public to complete the dedication by an acceptance. The donor cannot as we have already seen, annex to the dedication a condition that the way shall be under the control of other public or corporate officers than those invested by law with the government of the local territory within which the ways are situated, nor can he, as a rule at least, annex any condition which will have the effect to take from the proper local authorities the power to improve the way in the same mode as other public ways of the locality are improved.”

1 *Elliott, Roads & Streets* (3d Ed.), §163.

Holding ineffective an attempted reservation in the dedication of a street of the exclusive right to lay street railway tracks therein by the dedicat-  
or, the above rule was approved by the Supreme Court of Washington in *State etc. vs. Street Ry. Co.*, 19 Wash., 518, and it was said that “If any



condition is annexed to such dedication, the condition falls, but the grant stands.”

Be it remarked in this connection, that if it be held there was power in the Northern Pacific Railroad Company to dedicate its right of way as a street, then the statutes and the decisions of the Supreme Court of Washington are controlling as to the incidents which attach to it as a street. If the right of way is removed from the protection of the Congressional grant, then like all other property in the state it is fully amenable to the state laws.

If, then, the Northern Pacific Railroad Company could and did dedicate its right of way as a street, what was the extent of the dominion thereover which it surrendered under the laws of the state? First and foremost, the dedication, under §7853, *supra*, operated as a quit-claim deed to the right of way, and under §7837, *supra*, it was placed “under the control of the corporate authorities.” The extent of the control is made clear by the statute dealing with powers of cities of the first class, of which Spokane is one.

“Any such city shall have power—

To lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public

grounds, and to regulate and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof;

To change the grade of any street, highway, or alley within its corporate limits, and to provide for the payment of damages to any abutting owner or owners who shall have built or made other improvements upon such street, highway, or alley at any point opposite to the point where such change shall be made with reference to the grade of such street, highway, or alley as the same existed prior to such change;

To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; to provide for the alteration, change of grade, or removal thereof; to regulate the moving and operation of railroad and street railroad trains, cars, and locomotives within the corporate limits of said city; and to provide by ordinance for the protection of all persons and property against injury in the use of such railroads or street railroads."

2 *Rem. & Bal. Code*, §7507, Subds. 7, 8 and 9.

The extensive power of such cities in dealing with their streets and the use thereof is illustrated in *State etc. vs. Spokane*, 24 Wash., 53, *Spokane vs. Thompson*, 69 Wash., 650, *Spokane vs. Rail-*

*road Companies*, 135 Pac., 636, and the many cases therein cited.

And if there was a dedication of the right of way as a street, the surrender of control over it was not for use for street purposes alone. It is within the discretion of the corporate authorities to determine when a dedicated street has outlived its usefulness as a street, and to declare its vacation as such.

“Any person or body corporate in any city owning an interest in any real estate abutting upon any street or alley who may desire to vacate such street or alley, or any part thereof may petition the city council of such city or town to make vacation, giving a description of the property to be vacated, which petition shall be filed with the city clerk of said city or town; and (if said petition shall be signed by the owners of more than two-thirds of the private property abutting upon the part of such street or alley sought to be vacated) said city council shall, by resolution, fix a time when said petition shall be heard and determined, which time shall not be more than sixty (60) days, nor less than twenty (20) days after the date of the passage of such resolution and upon the passage of such resolution it shall be the duty of the city or town clerk to give twenty (20) days’ notice of the pendency of said petition by a written or printed notice set up in three (3) of the most public places in said city or town and a like notice in a conspicuous place on the street or alley sought to be vacated, which said notice shall contain a statement that a petition has

been filed to vacate said street or alley which shall be described in said notice, together with a statement of the time and place fixed for the hearing of said petition.”

2 *Rem. & Bal. Code*, §7840.

“At the time appointed for the hearing of said petition or at such time as the time may be adjourned to by the city council, the same shall be heard, and if the council shall determine to grant said petition or any part thereof, such city or town shall be authorized and have authority by ordinance to vacate such street, or alley or any part thereof.”

*Ibid*, §7841.

“When any street, alley or public way in any incorporated city or town in this state has heretofore been or may hereafter be vacated by the council or legislative body of said city or town, the property within the limits of any such street, alley or public way so vacated shall belong to the abutting property owners, one-half to each, unless within six months after the taking effect of this act, any person or corporation, who may feel himself or itself aggrieved by such a division, may commence an action in the proper courts of this state to determine the title to any such street, alley or public way so vacated.”

*Ibid*, §7842.

The vacation of streets is an exercise of a legislative function, and the action of the corporate authorities in that behalf is reviewable by the courts only when fraud or collusion is present.

*Ponischil vs. Hoquiam R. Co.*, 41 Wash., 303.

*Mottman vs. Olympia*, 45 Wash., 361.



It follows that if Railroad Street was actually dedicated as a street it is within the power of the municipal authorities, through the process of vacation, to take the title to the entire Northern Pacific right of way from the company and vest it in the abutting owners.

To digress for a space from the question of the extent of municipal control over Railroad Street if it is a street to the purposes of the right of way grant and the uses to which it may be put.

Complainants' counsel say that the Northern Pacific Railroad Company "could not alienate the fee of its right of way or any part thereof to a private individual." Apart from that, say they, "there is only one limitation on either a public or private use which may be permitted, and that is, that the use permitted do not disable the railroad company in the performance of its public functions."

A railroad company "is not at liberty to alienate any part (of its right of way) so as to interfere with the free exercise of the franchises granted."

*Grand T. R. R. Co. vs. Richardson*, 91 U. S., 454.

This declaration has but to do with the general powers of all railroad companies. It is the

declaration of a policy which is nation wide, and is established by court decisions, not by statute. It is as applicable to rights of way acquired by purchase or condemnation as to those given by public grant. There is more than that involved in this case. Here we have a public grant, and it is hedged about with limitations prescribed for the purpose of securing the full and free working out of the Congressional intent. It will not do, therefore, to judge the measure of the Northern Pacific Railroad Company's power over its right of way solely by the general policy embodied in the above quotation, nor by decisions of like import upon which complainants' counsel rely. Decisions construing the grant must be looked to to ascertain what, if any, additional limitations to those prescribed by general public policy Congress saw fit to impose upon the grant.

Your Honors said in *N. P. R. Co. vs. Spokane*, 64 Fed., 506, that in the Northern Pacific right of way grant there was an implied limitation "that the Railroad Company might not divert the granted strip to other and foreign uses, and might not cede to the public rights and easements so extensive or of such a nature, as to interfere with its duties to regularly and properly operate a railroad." The Supreme Court said of the

grant in *N. P. R. Co. vs. Smith*, 171 U. S., 260, 275, that "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." And in the *Townsend Case* (190 U. S., 267) the Supreme Court said that "The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad"; that it could not be "rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress," the decision of Congress as to the necessary width, embodied in the grant, being conclusive; and that "the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed."

Whatever of comfort there may be in the suggestion which complainants' counsel make, that these expressions "ought to be looked at in the light of the precise case before the court," they are welcome to. An authoritative construction of a public grant is none the less controlling when the construction is subsequently called in question because the cases are not "precisely" the

same. The highest courts of this jurisdiction have declared certain principles with respect to the Northern Pacific right of way grant. Those principles are directly involved in this case. Why are they not controlling? Said this court of the power of the railroad company to deal with its right of way, it "might not divert the granted strip to other and foreign uses, and might not cede to the public rights and easements so extensive or of such a nature, as to interfere with its duties to regularly and properly operate a railroad." That declaration, of course, does not foreclose the question whether the dedication of a longitudinal section of the right of way as a public highway is a diversion to foreign uses or such a cession as would interfere with the regular and proper operation of a railroad, but it certainly is conclusive upon the question that if it was such a diversion or would so interfere, it was not within the power of the railroad company to make it. So the declaration in the *Townsend Case* that the consideration for the grant "was the perpetual use of the land for the legitimate purposes of the railroad," and was given "that the obligations to the United States assumed in the acceptance of the act might be performed," does not establish that the dedication in question



would prevent the due performance of those obligations. But if it should appear that it would, the rule of construction so declared is authoritative, and would render the dedication nugatory.

Obviously the dedication of the right of way as a street, particularly when it lies through the center of a city of the size of Spokane, will interfere with the operation of a railroad upon the right of way, and prevent the performance of the obligations which was the condition of the grant. The statute provides that the dedication "shall be considered, to all intents and purposes, as a quit-claim deed." The dedicated street "shall be under the control of the corporate authorities." Under Subd. 7 of §7507 the city would have power, *inter alia*, to "grade, pave, plank, establish grades, or otherwise improve the street"; to "regulate and control the use thereof, and to vacate the same," etc. Under Subd. 8 it might change the grade of the street. Under Subd. 9 it might authorize or prohibit the construction of a railroad or street railroad in the street, prescribe the terms upon which such railroad or street railroad should be constructed; regulate the method and manner of operation of any railroad thereon; do, in short, anything it thought proper to do with respect to the use of the street

for street purposes. Changes of grade, lighting, paving, parking, aught else which the city might consider would render the dedicated strip more useful or desirable for street purposes, could be ordered, for if there is a street there, railway use must give way to street use, at least to any point short of actual extinction. The city might authorize the erection of telephone, telegraph and electric light poles therein, permit its use by other railroad and by street railroad companies, limit the number of tracks the company could maintain thereon, forbid the use of steam as a propulsive power thereover, make any other regulation which it thought necessary to the safety of general travel on the street, no matter how much such regulations might embarrass the operation of the railroad. Such powers does the statute clearly give, and such would be the city's powers over its streets if the statute were less explicit than it is.

“A municipal corporation cannot, by contract, surrender or alienate its governmental and police powers, which the public welfare demands that it should exercise. All rights granted by the municipality or contracts made by it with reference to the use of its streets are subject to its exercise of such powers, and a railroad company which secures the right to use the streets of a city takes such right subject to all reasonable

regulations and ordinances enacted by the city in the exercise of its police power. Thus, it has been held that a municipality may enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling its tracks; that it may, by ordinance, require the company to have some employe or agent on each car in addition to the driver, or to remove snow thrown up by the snowplows of the company; that it may temporarily remove the tracks of a street railway company, when necessary, in order to construct a sewer or culvert, or even require a change of track from one part of a street to another, or a bridge to be removed, or a tunnel to be lowered, and that such a company may be enjoined from digging into the street and rebuilding without the consent of the city authorities where the city has authority to prescribe the manner in which corporations shall exercise any privileges granted them in the use of its streets. So, as we have elsewhere shown, a municipal corporation may enact reasonable ordinances limiting the rate of speed at which trains shall be run, and prohibiting the obstruction of its streets by either commercial or street railway companies."

3 *Elliott, Railroads* (2d Ed.), §1082.

"As to the first question above suggested, it may be stated as a general proposition well established by the authorities that a city has absolute control over its streets and every part thereof, for the purpose of constructing sewers, or making other improvements which the welfare of the city demands; and unless there is some special allegation which shows that a different rule prevails as to the street in question, this general rule must be held

to establish the affirmative of said proposition.”

*Spokane St. Ry. Co. vs. Spokane*, 5 Wash., 634.

And see:

*Richmond etc. Co. vs. Richmond*, 96 U. S., 521;

*Baltimore vs. Trust Company*, 166 U. S., 673;

*So. Pac. Co. vs. Portland*, 227 U. S., 559;

*Pittsburg etc. Co. vs. Hood*, 94 Fed., 621;

*Newport etc. Co. vs. Hampton etc. Co.*, 47 S. E., 842;

*Petersburg vs. Aqueduct Co.*, 47 S. E., 849.

We must in this day concede to the Congress of 1864 something of prescience. Whether it foresaw all that has come and is yet to come to pass upon the Pacific Coast cannot be said. But plainly it forecasted much, and to secure the speedy development of the Northwest empire, and to assure for it adequate means of access and egress when it should be developed, it made the Northern Pacific grant. In all the courts the Congressional intent has been recognized and enforced. The right of way grant was made, have said the courts whose decisions control here, “in order that the obligations to the United States



assumed in the acceptance of the act might be performed," and it may not be diverted to "other and foreign uses," nor may there be ceded to the public therein "rights and easements so extensive or of such a nature as to interfere with its duties to regularly and properly operate a railroad." So it has been held that it was contrary to Congressional intent for the farmer in the country or the abutting lot owner in the city to acquire a right to even the smallest strip of the right of way because "by granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." But, say counsel, those decisions are not controlling, not even influential here, because they dealt with the acquirement of private rights by private individuals, while here it is a question of the acquirement of public rights by the public. Where, pray, is there in the Northern Pacific grant any word of discrimination between private right and public right; any suggestion that while a private individual cannot acquire any right, however small, in the right of way, the public may acquire any desired right therein, no matter what its nature and however great? And where is there reason for the dis-

crimination which is urged whereby the individual may not acquire the smallest strip of the right of way, though his ownership does not and never could affect the practical operation of the road, while the municipality may acquire a whole section of the right of way for street purposes, to the inevitable interference with, if not complete disablement of, railroad operation? The words "private right" and "public right" mean nothing in this connection. The Northern Pacific right of way was granted for a public use, it is true, but it was for a particular public use, not general public use. It was granted for railway, not highway use. It was granted for the purposes of a great transcontinental railroad in the operation of which the nation is interested, not for the purposes of a city street in the maintenance of which one municipality alone is interested. It needs no evidence, it needs no authority, to establish that the one use is utterly incompatible with the other. One or the other must give way, for a transcontinental railroad handling the enormous traffic which the Northern Pacific Railway does manifestly cannot operate its road in the center of a city street, along which as well as across which the city's street traffic continually flows. Furthermore, if there is power to dedicate the right of

way to highway purposes through Railroad Addition, there is power to dedicate it for such purposes through the City of Spokane, through the State of Washington, throughout the length and breadth of the Northern Pacific system. Likewise, if there is power to give for such use, there is power to take for such use. If the protection of the Federal grant is removed, the state stands supreme, and if it has said, or if it chooses to say, that highway use is superior to railway use, then it may take the right of way for highway purposes, no matter what the effect of the taking upon its use for railway purposes. The State of Washington is seeking a practicable route for a highway from Puget Sound to the eastern part of the state, one which may be constructed without inhibitory cost and which may be kept open across the Cascade Mountains during the winter. If it is within the power of the Northern Pacific to dedicate its right of way for highway purposes, why may not the state condemn the right to use it for such purposes from Seattle and Tacoma to Spokane, thus securing the benefits of the easy grades, its tunnels through the mountains, its bridges across the Columbia and other large rivers? If the joint use of the right of way for railroad, pedestrian and general vehicle travel is

feasible and permissible through the center of the City of Spokane, it is feasible and permissible at any point or all along the line.

There is nothing forced or fanciful in these suggestions. If there is power to give the right of way anywhere for highway purposes, there is power to give it everywhere. If there is power to give for such purposes, there is power in the state to take therefor. Whether given or taken, that which is devoted to highway uses may be used as any highway may be used. Railroad use, especially the use necessitated by the operation of a great transcontinental line, is incompatible with highway use, and here as on every other street and road railroad use must be subordinated to highway use. Not only must the city or county be free to regulate the railroad use so the highway use will be safe, but it must be free to improve the highway as highway needs seem to require. Surely no reasonable person will doubt that in the surrender of dominion and control over the right of way which necessarily results from its dedication to highway purposes, there lie vastly greater possibilities of its destruction for railway use, and consequently vastly greater likelihood of the thwarting of Congressional purpose, than would exist in permitting some chance



farmer here and there to acquire an insignificant strip of the right of way for the cultivation of his crops.

We wish to emphasize if we may by repetition, our insistence that there is no sound ground for distinguishing the case at bar from the *Townsend Case*. Congress, it is said in the *Townsend Case*, gave a right of way to the Northern Pacific Railroad Company, and made it a vast aid grant, on condition that it would build and operate a railroad upon the right of way. To ensure the performance of the obligations assumed, it put it beyond the power of the company to divert the right of way from railroad use. The purpose of Congress, it is there declared, was to secure the construction and continued operation of a vast railroad system, and it forbade any act in connection with its right of way grant which might tend to thwart the purpose. If the possession by a farmer of a small strip of the right of way, a strip never used and which would probably never be needed for railroad purposes, would have such tendency, then surely the giving over of the whole right of way, main tracks, second tracks, sidings, switches and all, to street use will have such tendency. To say that one act is forbidden and the other not because the right in one case is

private and in the other public is not to deal with the matter sensibly. Congress had one purpose; that the operation of the railroad on the right of way it had given for railroad use should not be interfered with by the grantee disposing of the right of way as it chose. It could make no difference to Congress whether the operation of the railroad was interfered with by a farmer cultivating the right of way, or by a city laying sewers in or putting electric light poles upon it. Undoubtedly, as an abstract legal proposition, public use is superior to private use, and much is permitted to public use which is forbidden to private use. But "public use" is no shibboleth to rule this case and remove it from the operation of the *Townsend Case*. To determine whether this case is ruled by the *Townsend Case* we must look to the Congressional intent as declared in that case, and from that decide whether in the use sought to be established here there is aught which might tend to defeat that intent. It is the effect of the use upon the use for which Congress granted the right of way which is decisive of whether it is permissible, and that effect is not ascertained by saying the use sought to be upheld is a public use. The occupation of the right of way for a public park, a public playground, school

grounds, a city market, or any other of a hundred and one conceivable municipal uses, is as much an occupation for a public use as would be its occupation for street purposes. But would any reasonable person urge that such occupation was permissible notwithstanding the *Townsend Case*, because, and only because, it was for a public use? The absurdity of such a claim would be patent, yet the present claim is distinguishable from it only in degree, if at all. What with street travel crossing the tracks at the numerous intersecting street crossings at grade, what with street travel to and fro along the right of way, what with municipal improvement of the right of way for street purposes and municipal regulation of railroad operation thereon so that all forms of street use might be made of it, the company might as well have turned over the right of way for a public park, playground, or market, so far as any possible use of it for railroad purposes is concerned. Since that was the use for which Congress granted it, we hardly see how the effect of its destruction for such use may be disguised by saying that the use which destroyed it was a public use.

Proceeding along a line of thought akin to, and fallacious as, that by which the *Townsend Case*

was sought to be distinguished, counsel claim comfort from that case and from *N. P. R. Co. v. Spokane* on the theory that there is no distinction between making use of the right of way for street crossings and giving it over longitudinally to street use. They urge that "The necessities of a municipality will always require" street crossings, and that "they may often imperatively require" the use of a railroad right of way longitudinally for street purposes. So from the acknowledged power of the company to give, and of the city to take, the right to cross the right of way with streets, the same power of donation and acquisition is attempted to be deduced as to longitudinal occupation of the right of way for street purposes.

The fact stated, *i. e.*, that the necessities of a municipality will often "imperatively require" the use of a railroad right of way for street purposes, is not true. Municipal needs never require the seizure of railroad right of way for street use. The authorities next cited show that municipalities have often thought it was imperative that they should take railroad right of way for street use, but they have never been able to persuade the courts to concur in their opinion. The distinction from the standpoint of necessity alone



between crossing a railroad right of way and occupying it longitudinally with a street is too palpable to permit remark. It is as easy to parallel a railroad right of way with a street as to occupy it, while there is but one way to cross it. However, the question is not to be solved by reference to the needs of the municipality alone. The intent of Congress, which not only created the Northern Pacific Railroad Company and the Northern Pacific right of way, but Washington Territory and Spokane Falls as well, is the decisive factor in determining the power of the one to give and of the other to take the right of way for a street. This court in *N. P. R. Co. v. Spokane*, and the Supreme Court in the *Townsend Case*, have said that Congress contemplated the necessity for highway crossings across this right of way extending from Lake Superior to Puget Sound, and that such might be donated or taken. But the right to donate or take was indicated in those cases to be limited by strict necessity, and then to such cession or taking as would not destroy the railroad use. The railroad company "might not divert the granted strip to other and foreign uses, and might not cede to the public rights and easements so extensive or of such a nature as to interfere with its duties to regularly

and properly operate a railroad.” The public easement to cross the right of way “is undoubtedly subservient to the exigencies of railroad use, and the public take the dedicated crossing subject to the inconveniences which may result from the increase of traffic and transportation along the line of the road, and the possible necessity of laying more tracks thereupon.” A railroad company may “in recognition of public interests, and for the promotion of the public welfare, dedicate to the public an easement over its right of way which does not interfere with its own use of the same for a railroad.” *N. P. R. Co. v. Spokane*. Congressional intent, then, is the controlling factor, and while on one hand it is plain that Congress did not intend to build a Chinese wall across the continent from Lake Superior to Puget Sound, shutting off highway travel between the sections it separates, it is on the other hand equally plain that it did not intend that the right of way it gave for railroad use, in order that a great railroad system might be built and operated thereover, should be diverted from such use and devoted to highway purposes by every little municipality through which the line passed. Most carefully did this court throughout the opinion above referred to point the distinction. And even had it

not; even if there were no controlling authority to rule the case, it would be a more than usually bold or undiscerning man who would attempt to assimilate the need and the power to cross a railroad right of way with a street to the need and the power to take a railroad right of way for a street. Over and over again have the courts held that though it may be in the power of the state to take property devoted to one public use and divert it to another public use, the exercise of such power will not be presumed to be intended, but must be declared in unequivocal language. It is uniformly held, therefore, that from mere authority to open streets and condemn land therefor the power to lay out a street longitudinally upon a railroad right of way will not be inferred, though it is ample to confer power to open a street across such right of way; the distinction being that to lay out a street along a right of way is necessarily to take the land from railroad use and devote it to highway use, while the other is simply to use the right of way for crossing purposes in ordinary fashion, the which is neither destructive to nor seriously affects its use for railroad purposes.

“The distinction between the crossing of a highway or the track of a railroad, and the occupation of the road-bed, which in its nature must necessarily be exclusive, is recognized in

the cases cited. Under a condemnation of a right to cross, nothing will be acquired but a mere right of way, and the place of crossing will remain in common use of the parties for the exercise of their several franchises. The condemnation, under such circumstances, will leave the franchise unimpaired. *State, The Easton and Amboy R. R. Co., pros., v. The National R. R. Co.*, 7 Vroom 181. A right affecting so slightly the exercise of the franchises of another corporation may be deduced from a mere grant of the power of condemnation.

But where the use for which the condemnation is prosecuted is of such a character as necessarily to require for its enjoyment the exclusive possession and occupation of the premises, it is manifest the condemnation will be utterly futile, unless it may operate also to extinguish the right of the corporation whose title is condemned to use the lands for its corporate purposes. A condemnation that will accomplish this result will destroy, *pro tanto*, the franchises of the corporation, and impair, to that extent, the powers granted by the legislature. Especially will that be the case where the land has been improved and applied to the designated use by making a roadway or the construction of tracks and improvements upon it. Still more obviously will the legislative intent be defeated where priority of location confers priority of right. The power to invade the privileges of a corporation in such manner will not be inferred from a naked grant of the power to condemn. It can only be derived from a power granted either in express terms or arising by a necessary implication; and the legislative intent to authorize such an interference with the rights and privileges of another corporation—whichever way



it may be manifested—must be plainly perceived.”

*Railroad Company vs. Commissioners*, 39 N. J. L., 28, 33.

“It is obvious, therefore, that the ultimate question in this case is whether the statute authorizing municipal corporations to appropriate lands for streets confers power to seize land occupied and used by a railroad company. That it does not is affirmed in the well-considered case of *City of Valparaiso vs. Railway Co.*, 123 Ind. 467, 24 N. E. Rep. 249. The decision in that case is well supported by authority. It is suggested that there is a distinction between this case and the case of *City of Valparaiso vs. Railway Co.*, *supra*, inasmuch as the opening and construction of a street does not destroy the railroad. But there is no ground upon which a distinction can be made. If the city has authority to establish a street the rights of the railroad company may be radically changed. If the land is taken by the city the highway ceases to be a railroad, and becomes a street. The authority over it, and the responsibility of maintaining it, would, in that event, pass from the private corporation, and vest in the municipality. *Railway Co. vs. Phillips*, 112 Ind. 59, 13 N. E. Rep. 132. It is true that a railroad may exist in a street, but the highway when it becomes a street essentially changes its character; losing, indeed, one character and taking on another. Not only so, but more, for if the authority to appropriate the land exists, it empowers the municipality to entirely exclude the railroad company from the occupancy of the street. There is nothing in the statute warranting the assumption that a municipal corporation may seize property for a street, and yet suffer it to continue to

be part of a continuous line of railroad.”

*Seymour vs. Jeffersonville, etc., Co.* (Ind.)  
26 N. E., 188.

The accentuation by Judge Elliott (whose opinions upon such a subject ought to be accepted as authority) in the above opinion of the point which rules this case, *viz.*, that a railroad right of way which is taken for highway purposes ceases to be a railroad and becomes a street, seems worthy of remark.

“Again, under the great weight of authority, neither the defendants nor the county commissioners of Wyandotte county could open or construct a public highway parallel with the track of the railway on the right of way granted by congress. Pierce, R. R. 155, states the law as follows: ‘Thus, if a railroad is authorized between certain points, and if necessarily, or in the usual and convenient course, it will cross highways or other railroads, it may be laid across them, even without any express reference to them in the authority. Such crossing, being necessary to the enjoyment of the second grant, and not essentially impairing the first, is presumed to be authorized. But, on the other hand, the right to take exclusively the location made under the first grant, or any part of it, or to lay tracks longitudinally for a considerable distance upon it, ought to be expressly conferred or implied only where otherwise effect could not be given to the second grant.’ Mills, Em. Dom. §46, says: ‘Under a general authority to condemn lands for streets, a street may be laid out across a railroad, but not longitudinally on the railroad

track. Under general laws, property cannot be taken, where the appropriation will destroy or impair the exercise of the franchises of another corporation, unless the power to take is given in express terms, or arises from a necessary implication. The right to lay a street across a railroad track arises from a necessary implication.' Lewis, Em. Dom., also says: 'A general authority to lay out highways and streets is sufficient to authorize a lay-out across the right of way of a railroad.

\* \* \* \* An authority to lay out a highway across the track of a railroad company is authority to cross all the tracks at any place. But under a general authority to lay out highways a part of the right of way of a railroad cannot be taken longitudinally; nor can the way be laid through depot grounds, shops, and the like, which are devoted to special uses in connection with the road, and necessary to its operation, and in constant use in connection therewith.' Section 266."

*U. P. R. Co. vs. Kindred* (Kan.), 23 Pac., 112.

Other authorities to the same effect are:

1 *Elliott, Roads & Streets* (3rd Ed), §§245, 247.

2 *Lewis, Eminent Domain* (3rd Ed), §417.

*Fort Wayne vs. Ry. Co.*, 32 N. E., 215.

*Railway Co. vs. Hartland*, 88 N. W., 423.

*Railway Co. vs. Johnston*, 49 S. E., 496.

*Bridgeport vs. Railway Co.*, 36 Conn., 255.

*Turnpike Co. vs. Middlesex*, 10 Pick., 270.

With one exception, the *Kindred Case*, the rights of way involved in the above cases were those of

state chartered railroads, whose rights of way were acquired by condemnation or purchase. They are not, therefore, authority as to the possible power of the state to authorize a condemnation of the Northern Pacific right of way, and are not cited by us as such. They are cited merely to show the universal recognition by the courts that the laying out of a street longitudinally upon a railroad right of way and tracks is to destroy them for railway uses. The gist of those decisions is this:

The title to land acquired for right of way purposes by a state chartered railroad, under a state grant of authority to purchase and condemn, has no higher source than the title acquired by a municipality under state granted authority to open streets and condemn land therefor. Both have the same source, the state. Both, too, in the absence of explicit legislative declaration to the contrary, are for an equal, though different, public use. The opening of a street longitudinally upon a railroad right of way and tracks necessarily destroys the railway use and converts the land into a street. As put by Judge Elliott in the *Seymour Case*: "If the land is taken by the city, the highway ceases to be a railroad, and becomes a street," whereupon the authority over it and responsibility for maintaining it "pass from the private corpora-



tion and vest in the municipality.” This, consequently, is to divert land already devoted to one public use to an entirely different public use, a thing which, while permissible when the state is the source of the right of both railroad and municipality to take and hold land if the legislature explicitly so provides, will not be considered authorized by mere legislative authorization to municipalities to open streets and condemn land therefor.

The state, of course, cannot authorize the condemnation of a right of way which Congress has granted for one public use in order that it may be devoted to another public use, and in so far as the above authorities recognize the latent power of the state to so act with respect to rights of way acquired by purchase or condemnation under state authority they are inapplicable here. They are strictly applicable, however, upon the point decided in them, *viz.*, that the opening of a street longitudinally upon a railroad right of way is to convert it from a railroad into a street, and necessarily diverts it from railroad use. This is all that need be established here to warrant the declaration that the attempted dedication of the Northern Pacific right of way as a street was beyond the power of the company.

Counsel say the foregoing decisions were based

upon state policy and intimate that no such policy prevails in the state of Washington. The contrary is true. While there has never been in the state of Washington any attempt by a municipality to take a railroad right of way for street purposes, analogous attempts have been made by one railway company upon another. In *Seattle, etc., Co. v. State of Washington*, 7 Wash., 150, it was held that a statute which gave to a railroad company "the power to cross, intersect, join, and unite its railway with any other railway before constructed at any point in its route and upon the grounds of such other railway company" did not confer power upon one railway company to cross the tracks of another railway company in such fashion that there would be in effect a longitudinal taking of the tracks for some little distance. In that case for a distance of more than 400 feet it would have been impracticable to operate one set of tracks while the other was in actual use, and this, the court held, amounted to a longitudinal taking. See also *State ex rel Ry. Co. v. Superior Court*, 45 Wash., 270, where it was held that one railway company could not cross the yards of another railway company when to do so would seriously interfere with the business of the prior company. It will be seen by these decisions that if the question

is to turn upon the matter of state policy, it turns in favor of the defendant's contention.

It is said that "the right to dedicate streets in rights of way" "is quite a different thing from the right to condemn," and in other portions of the brief it is intimated that the power of dedication is a wider power than that of condemnation.

On the surface that may or may not be true generally. Whether it is depends upon the governing statutes. The two powers, however, are in principle equal and co-extensive.

Where the state is the source of the power of a railroad company to take, hold and use land for railway purposes, the state may measure that power as it will. The state which declares that the taking of land for railroad purposes is a taking for a public use, and so permits it, may declare that there are other and higher public uses, and permit the land taken for railroad use to be taken for such other use as it may declare superior. But, as we have seen above, there must be an explicit declaration to that effect or it will not be permitted. Based upon the same principle, the state, where it is the source of power may permit a railroad company which has taken land for and devoted it to a public use, to abandon that use and give up the land. But

here again it will not be presumed that the state intended that a quasi public corporation like a railroad company should disable itself to serve the public, and there must be power explicitly conferred upon a railroad company to dispose of its land which is devoted to the public service. So while it is "ordinarily true" that a private corporation may make a dedication of land, the power is limited by this, that the dedication "does not interfere with the purposes for which the company was incorporated." 1 *Elliott, Roads & Streets* (3rd Ed) § 161. Speaking of decisions recognizing the power of a railroad company to release or convey a portion of its right of way so that a private right of way or a highway might be acquired thereover, it was said:

"The doctrine above stated, under our statutes and the general principles of law, should be received, we think, with an important limitation. Railroad companies are allowed to acquire rights of way by condemnation because of the interest the public has in the construction and operation of their roads as highways, and hence a right of way so acquired is burdened with duties to the public. Therefore it may be stated as a general proposition, while the railroad company may deal with the right of way so acquired as its own in the conduct of its business as a carrier, it cannot dispose of it or use it so as to destroy or impair its ability to serve the public. 5 *Thompson on Corporations*, §§5878, 6137; *Thomas v. R. R.*



*Co.*, 101 U. S. 87, 25 L. Ed. 950; *Ry. Co. vs. Hyatt* (Cal.), 64 Pac. 272, 54 L. R. A. 522; *Collett vs. Com'rs.* (Ind. Sup.), 21 N. E. 329, 4 L. R. A. 321; *R. R. Co. vs. Spokane*, 64 Fed. 506, 12 C. C. A. 246.

*Matthews vs. Railway Company*, 46 S. E. 335.

The power to take land devoted to a public use and divert it to another public use, and the power of a quasi public corporation voluntarily to divert land devoted to a public use to another public use, spring, then, from the same source, the state, and ordinarily the two are in all respects identical. They are here. When the so-called dedication was made, the present state of Washington was a territory, deriving all the powers it had from Congress. When Congress chartered the Northern Pacific Railroad Company, authorized it to build a railroad across the public domain, and gave it a right of way for that purpose, it impliedly denied to one of its creations, the Northern Pacific Railroad Company, the power voluntarily to divert any of the right of way to any other use than that for which it was granted, and by equal implication denied to its other creation, the Territory of Washington, the power to divert the right of way to an alien use against the will of the railroad company.

If Congress neither directly nor indirectly authorized its creatures, the Territory of Washington

and the Village of Spokane Falls, to condemn the right of way of its creature, the Railroad Company, and if without such authority the territory or the village could not condemn the right of way in question, then how could these two creatures of Congress, by putting their heads together, through the guise of a dedication by the company and the implied, or for that matter express acceptance by the village, effectuate something which the one could not do the other objecting? The right of the railroad company to object had the village endeavored to condemn rested upon the public policy of the Congressional grant to it. Certainly that public policy is as potent, the village and the railroad agreeing, as it would have been the village and the railroad disagreeing. Neither the convenience of the village nor the inconvenience to the railroad company would have been the controlling factors in determining the right in litigation, but Congressional policy. The railroad and the village agreeing could not affect that policy. Their respective private rights, conveniences and inconveniences might have been determined by agreement, but the public policy of their common creator and master, the Congress of the United States, could not be affected by their agreement.

There is here, then, no difference between the

right to dedicate and the right to condemn. In degree as well as in kind they are alike.

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The power of dedication has so far been considered in the light of limitations of the Congressional grant of the Northern Pacific right of way. No different result will be reached if those limitations are disregarded, and the right of way is regarded as being held upon the same tenure as that upon which any railroad right of way, however acquired, is held. Neither will it be if we take the decisions which complainants' counsel cite in their aid as the text for our argument.

A nation wide policy, declared in the decisions of every court in the land, forbids railroad companies doing any act which will destroy or impair their power to serve the public unless under competent legislative sanction. No legislative sanction can be found for any railroad company within the State of Washington dedicating its right of way longitudinally for street purposes. No authority and no evidence but common sense is needed to demonstrate that such a dedication if covering the entire right of way is destructive to, or at the least must seriously impair, the power to serve the public.

In the case at bar, Railroad Street, with its width of 225 feet, covers every track used by the Northern Pacific in handling its transcontinental and local traffic through and into Spokane, and in serving a large portion of the wholesale business of the city. If it is a street, it is open to all forms of street travel, and the City of Spokane may authorize street car operation upon it, and use it for all other urban street purposes; for sewers, water and gas pipes, telephone, telegraph and electric light poles or conduits. Transcontinental, local, and switching trains must adapt their movements to all these street uses. The city, too, may regulate the movement of the railroad traffic in the many ways which are permissible under the police power when a railroad is permitted to maintain its tracks in a street; even to forbid the use of steam locomotives thereon (96 U. S. 521; 227 U. S. 559), or to cut down the trackage to a single track (166 U. S. 673). Complainants' counsel do not question this, saying (brief, p. 67) that the reservation of the right to use Railroad Street for railroad purposes "cannot be construed to mean any use to which the Company may see fit to put the street," but only such as is "consistent with the maintenance of the street as a street," and that the use should be (p. 69) "confined to the tracks shown on the town



plat," i. e., the main track and two sidings, about 700 feet in length, extending between Monroe and Post streets.

So far as the Northern Pacific service is concerned, then, Spokane must turn back from the present day city of 125,000 people to the little frontier village of 1881. It must take a position inferior to that of any siding, flag or water station on the Northern Pacific system, for no present day transcontinental passenger train, not to speak of the half mile or longer freight trains now so common, could stand on one of the short sidings shown on the plat. The constantly increasing traffic of the Northern Pacific has made double tracks necessary through all the larger towns on its line and for a goodly number of miles on each side their limits; not for switching purposes, but that the trains being run over the line may not be unduly delayed. Through the City of Spokane, and for many miles on either side of it, the line is double tracked. If complainants are sound in their contentions, all this work must come out through the heart of the city, and the trackage of the road reduced to a single track with two little inutile sidings, and even this must be used under the thousand embarrassments, harassments and hamperings which render the practical operation of a steam

railroad over a city street impossible.

The decisions upon which complainants' counsel most rely to establish the power of a railroad company to so deal with its right of way as to bring about such a result forbid it. They were cases where one railway company had granted another railway company the right to use its tracks for railway purposes, the grant being surrounded by such limitations upon the use as to retain the control of the tracks in the grantor company and prevent any undue hampering of its operations. Subsequently the grantor company sought to avoid the grant, not because its operations were hampered by the use granted to the other company, but because it feared that at some time in the future they might be. A fundamental and radical distinction between the cited cases and the case at bar is apparent in the mere statement. In the cited cases, the tracks were not granted for a different use, nor did the grantor surrender its dominion and control over them. Here both such conditions would be present should the dedication be upheld to the extent for which complainants contend. This patent distinction was in the mind of the great judges from whom counsel quote. Said Judge Brewer concerning the contract there claimed to be *ultra vires* in a part of his opinion which counsel

did not quote:

“It clearly will not operate at present to disable the Pacific from discharging its duties. While the Rock Island is let into possession and use, the Pacific is not put out of possession and use. There is no surrender of the exclusive use of any portion of the Pacific’s Line. It remains in the undisturbed possession of every mile of its track; can operate all its trains, and discharge all the duties which it owes to the government or the public.” *A different question would arise if it had attempted by this instrument to dispose of the full possession of the same length of its track.*

(The italics are ours.)

*Chicago, etc., Co. v. U. P. R. Co.*, 47 Fed., 23.

And again:

“In the case at bar, as we have seen, the contract is not one for the dispossession of the Pacific Company from the use of its tracks or other facilities. It is not one disabling it from discharging its duties. It is simply one to coin into money, for its benefit, the surplus use of a part of its property. Can it be that such a contract is beyond the powers implied by the grant? Concede that, under the power to lay out, construct, and operate a railroad, it is not authorized to build tracks for the purposes of sale or lease, but when discharging its duties it builds tracks for its own use, and uses them, if all the use it can make is limited, and there be a large amount of surplus use, upon what reason can it be adjudged that that surplus use must necessarily lie idle? It is a thing of value. It may be, as it is done by this contract, coined into money. What right or

interest of the government or public is prejudiced thereby? If a railroad company builds a depot which is larger than its present needs require, may it not rent one room, and receive profit therefrom? Or must it, because it is not authorized to build buildings for rent, let that room remain vacant until the increase of its business requires its use? The Pacific Company may not build tracks for the purpose of leasing them, but it must have at least one track for the passage of its own trains. If its trains do not fully use that track, as in this case they do not, it has a surplus of use, which is of value, and which it may make profit out of in any manner not inconsistent with its duties to the public and its obligations to the government. I think it may be laid down as a general proposition that a corporation which, in its discharge of the duties imposed by its charter, acquires property which it must have for its own uses, may, if there be a surplus use of such property, make a contract for the disposition of such surplus use in any manner not inconsistent with the purposes of its creation. So I conclude that neither of the three objections is well taken, and hold that the contract is not *ultra vires*."

Of this same case it was said in the Supreme Court in the outset of the opinion:

"The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the State, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel. *Thomas v. Railroad Co.*, 101 U. S.



71; *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24.

*U. P. R. Co. v. Chicago, etc., Co.*, 163 U. S. 581.

The court thereupon entered upon a consideration of Congressional legislation with respect to railroad development in the west, from which was deduced a "great policy in favor of continuous lines" and found "effectuation of that policy" in such contracts as that under consideration. Then:

"We are of opinion that it was within the powers of the Pacific Company to enter into contracts for running arrangements, including the use of its tracks, and the connections and accommodations provided for, and we cannot perceive that this particular contract was open to the objection that it disabled the Pacific Company from discharging its duties to the public. By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands of a wise public policy. If, by so doing, it may have assisted a competitor, it does not lie in its mouth to urge that as rendering its contract illegal as opposed to public policy. Ability to

perform its own immediate duties to the public is the limitation on its *jus disponendi* we are considering, and that limitation had no application to such a use as that in question."

These cases, surely, are more than negative authority against the power of dedication which complainants here seek to uphold. They sustain a contract by which a railroad "widened the extent of the use of its property for the same purposes for which that property was acquired" while not surrendering its dominion over such property or interfering with its ability to duly serve the public, but by more than necessary implication deny the validity of a contract by which a railroad company should attempt to wholly surrender dominion over its property which is devoted to a public use and give it over to another and paramount use which, though public in its nature, was wholly different in character from the use for which the property was acquired; not only different in character, but utterly incompatible with the use to which it was first devoted. All these conditions are present in an attempt to dedicate the right of way of a great transcontinental railroad through the heart of a large city to street uses, else reason and authority have lost their sway.

We submit, therefore, that whether judged from the standpoint of the purpose and implied limita-

tions of the Congressional grant, or from that of the general policy governing all railroads, the dedication sought to be upheld must fall.

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It is insisted that the question of the power of the Northern Pacific Railroad Company to dedicate its right of way to street uses must be determined in the light of conditions as they were in 1881, and not as they were in 1913, and that as the company could have handled all the business it had to take care of in 1881 through and in the village of Spokane Falls, notwithstanding the dedication, conditions as they are at the present time will not be considered to invalidate the dedication.

If the limitations upon the Northern Pacific right of way grant are as we claim them to be, it certainly makes no difference which period is held to be the proper one from which to study the question of power of dedication. As we have before stated, Railroad Street covered the center of the right of way, and the main track of the road was in the center of the street, in 1881 as well as in 1913. Unless all the authorities we have heretofore referred to grossly err, the dedication of a railroad right of way to street uses is to divert it to another and foreign use; a thing it was utterly beyond the

power of the Northern Pacific Railroad Company to do with its right of way, no matter when attempted or what the conditions were when it was attempted. But if complainants' theory is sound, and the railway company could make any disposition it chose of its right of way within the limit of its power to properly serve the public, it makes a great deal of difference whether 1881 or 1913 is fixed as the time from which to determine the validity of the dedication. And if we must accept complainants' theory as sound that the power to dedicate must be measured by the ability of the company to discharge its public duties, it is manifest that present day conditions must be regarded.

When the dedication was made, and for years afterward, Spokane Falls was a village, chiefly existing upon paper. People traveled around over vacant land, whether streets, lots, or railroad right of way, as their convenience dictated. As the village grew to a town and from town to city, and streets were graded and improved, travel began to follow the lines of the streets. During that period of growth, the business of the railroad company grew. As more track room was needed, additional tracks were laid, without let or hindrance from any one. Wholesale houses, even, great brick buildings, were built in what is now claimed to be



Railroad Street, under license from the company. The street, in a word, was never used or improved as a street, the city never exercised or attempted to exercise any authority over it as a street, and the company used it as its private property just as it did any other part of its right of way. The so-called dedication, then, was a mere paper dedication, which in no way interfered with the actual occupation and use of the dedicated strip by the company as it chose. A dedication was first claimed, and the railway company's dominion over the dedicated strip was first sought to be interfered with, when this suit was brought. Now if, as claimed by complainants, the power to dedicate must be measured by the railway company's need to use, the need must be determined when first the courts are called upon to declare the dedicatory power. It were too absurd to look back to the conditions in 1881 and say the needs of the company were then so small the dedication would have been upheld had it been called in question, consequently such conditions must govern in determining the power now, when for the first time its measure must be ascertained.

And this brings us naturally to another of complainants' contentions. In the *Chicago & Rock Island-Union Pacific* case, Judge Brewer on circuit

(47 Fed. 16), and the Supreme Court when the case reached it (163 U. S. 564), said that if the contract which was there upheld under the existing conditions should, because of changed conditions, impair the ability of the grantor railroad company to properly serve the public, a court of equity could grant relief, even to the extent of abrogation of the contract. Counsel recognize that the principle there declared would justify refusing effect to a dedication such as that in question in a proper case, but say no such case is here presented because the railway company has not come into equity seeking relief and as a condition thereto offering to do equity.

Counsel seem to forget what their clients' complaint is and what the relief they seek. They complain that a dedication was made which the dedicator has denied, and that the City of Spokane, the representative of the public for the purpose of accepting the dedication and making use of the dedicated strip, has not merely acquiesced in the denial but has actively aided and abetted the diversion of such strip from the purposes for which it was dedicated by the adoption of an ordinance which, if acted on, will render it impossible, finally and irretrievably, to use the strip for street purposes. The relief prayed is, in effect, specific

performance of the dedicatory contract through the medium of enjoining the use of the dedicated strip for other than street purposes. Now we had supposed that it was fairly well settled that a plaintiff could not obtain equitable relief unless he made a case therefor measured by equitable principles, and that a court of equity would never enforce a contract which was unconscionable or opposed to public policy. Whatever the dedicatory contract might have been in 1881, it is beyond peradventure that to give effect to it now to the extent claimed by complainants, or at all, would be both unconscionable and contrary to public policy. If, as complainants urge, the railroad officials did not foresee the wondrous growth of this country, and supposed the little frontier village of Spokane Falls would always remain what it then was, is there in such ignorance, or at least sad want of foresight, cause to move a court of equity to specifically enforce a contract they would not have made had they dreamed of present day conditions, and the enforcement of which now must be so disastrous? More. The dedication was made without thought, say complainants, that the right of way would ever be needed for railway purposes. But it is needed, and sadly needed, for such purposes now, and to specifically enforce the dedicatory contract will

greatly impair, if not destroy, the ability of the railway company to discharge its public functions. This, say the courts, is contrary to public policy. Since when have courts of equity been willing to enforce a contract when to do so is to run counter to public policy?

“But whether this contract be absolutely void as contravening public policy or not, we are clearly of the opinion that it does not belong to that class of contracts, the specific performance of which a court of equity can be called upon to enforce. To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. This distinction was recognized by this court in *Cathcart v. Robinson*, 5 Pet. 264, 276, wherein Chief Justice Marshall says: ‘The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. 10 Ves. 292; 2 Coxe’s Cases in Chancery, 77. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation or any unfairness, are enumerated



among the causes which will induce the court to refuse its aid.' This principle is reasserted in *Hennessy v. Woolworth*, 128 U. S. 438, 442, in which it was said that specific performance is not of absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, and always with reference to the facts of the particular case. *Willard v. Taylor*, 8 Wall. 557, 567; *Marble Co. v. Ripley*, 10 Wall. 339, 357; 1 Story's Eq. Jur. sec. 742; *Seymour v. Delancey*, 6 Johns. Ch. 222, 224; *White v. Damon*, 7 Ves. 30, 35; *Radcliffe v. Warrington* 12 Ves., 326, 331."

*Pope Mfg. Co. v. Gormully*, 144 U. S., 225, 236.

We think if counsel had recurred to fundamental principles a little more frequently while writing their brief, they would not have assumed so many impossible positions.

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The only authorities cited by complainant which in any way militate against the construction we claim must be placed upon the Northern Pacific right of way grant are *North C. R. Co. v. N. P. R. Co.*, 48 Wash., 529, and *U. P. R. Co. v. Greeley*, 189 Fed., 12. We are relieved from the burden of critically examining these cases by the consideration that whatever might be the effect of these decisions if they were accepted as authoritative upon the

abstract question of the power of the Northern Pacific to deal with its right of way, they do not affect the ultimate question presented here. The Washington case, which permitted another railroad company to take for its right of way an unused and unneeded strip from the Northern Pacific right of way, was decided in accordance with the state policy which permits one public service corporation to take for necessary public uses the property of another public service corporation which is not devoted to or needed for the public service. The court thought there was not in the Federal grant any denial of "the power of the state to determine whether the whole of a right of way \* \* is actually needed as against the requirements of the public service which arise with the increase of commerce and transportation necessities." The *Greeley Case* was like in character. Strips of a 400 foot right of way granted by Congress which had never been used and it seemed would never be needed for railroad purposes, were acquired by a city and another railroad company for street and for railroad uses. Such acquirement was upheld upon the ground that it was acquired "for public and not for private use"; that the portion "which encroaches upon complainant's alleged right of way is not now required by the complainant, and, so

far as is disclosed by the evidence, will not be necessary in the near future, to enable complainant to fully and freely discharge its duties to the public"; and, therefore, complainant was estopped "from *now* claiming" as against the other parties "that it is entitled to the *present* possession of the *entire* 400 foot right of way" (our italics). The intimation contained in the words above quoted seems to range this case with the *Chicago & Rock Island-Union Pacific Cases* referred to heretofore, in which event it is probably not so open to criticism as it would otherwise be. However, it is of no authority here. We have here no case of a strip of right of way never used or needed, and which probably never will be needed or used for railroad purposes, being diverted to another use. Along the center of its 400 foot right of way, the Northern Pacific Railroad Company marked out a strip 225 feet wide which it called Railroad Street. It platted and sold its right of way on either side of this strip, and though such action would have been vain had not Congress seen fit to ratify it, Congress did see fit to ratify it by the validating act of 1904. It has nothing left for its right of way through Spokane but this strip. In the center of it lies, and always has lain, the main track of its road. That track is now doubled, and in addition it now

has on the strip in controversy the secondary tracks, side tracks and switch tracks which the vastly increased and ever increasing traffic of the railroad company requires. So much has the railroad traffic along the right of way, and the street traffic across it at the intersecting streets, increased that the city (its action, we may concede, jumping with the wishes of the railroad company) has ordered a separation of grades by the filling in of the right of way so as to carry the tracks across the intersecting streets above their levels. If Railroad Street is a street, not only may not this separation of grades be made and the dangers resulting from crossing streams of railroad travel and street travel at grade so be eliminated, but Railroad Street must be thrown open throughout its length and breadth to urban street travel of every kind, urban street use of every sort, and urban street regulation of every character. That to do so is to render the operation of the Northern Pacific railroad along it impossible is too patent for argument. Remove the warehouses if you please, restrict switching operations to the minimum possible in order to adequately serve the business which must be served in a city the size of Spokane, and yet it would be impossible to handle the traffic, freight and passenger, through, into and out of Spokane, over such a line as the Northern



Pacific in a city street. The case, then, is no more ruled by the *North Coast* and *Greeley Cases* than it is by the *Chicago & Rock Island-Union Pacific Cases*. None permits, and each by more than implication forbids, the diverting of a railroad right of way to any use, no matter what its character, which impairs the railroad use.

### III.

#### *Statutory Dedication.*

The laws of Washington Territory, Code of 1881, governing the platting of townsites and additions, and the dedication of streets thereover, in effect at the time Railroad Addition was platted, read as follows:

“Any person or persons, who may hereafter lay off any town within this territory, shall, previous to the sale of any lots within such town, cause to be recorded in the recorder’s office of the county wherein the same may lie, a plat of said town, with the public grounds (if any there be), streets, lanes and alleys, with their respective widths properly marked, and the lots regularly numbered, and the size stated on said plat.

“Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be considered, to all intents and purposes, as a quit claim deed

to the said donee or donees, grantee or grantees, for his, her or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid.

“Every person hereinafter laying off any lots in addition to any town, shall, previous to the sale of such lots, have the same recorded under the like regulations as are provided for recording the original plat of said town, and thereafter the same shall be considered an addition thereto.

“Every person whose duty it may be to comply with the foregoing regulations shall, at or before the time of offering such plat for record, acknowledge the same before the recorder of the proper county, or any other officer who is authorized by law to take the acknowledgment of deeds, a certificate of which acknowledgment shall be, by the officer taking the same, endorsed on or annexed to such plat and recorded therewith.

“All streets, lanes and alleys, laid off and recorded in accordance with the foregoing provisions, shall be considered, to all intents and purposes, public highways, and any person who may lay off any town or any addition to any town in this territory, and neglect or refuse to comply with the requisitions aforesaid, shall forfeit and pay for the use of said town, for every month he may delay a compliance with the provisions of this chapter, a sum not exceeding one hundred dollars, nor less than five dollars, to be recovered by civil action, in the name of the treasurer of the county.”

§§2328, 2329, 2330, 2331, 2332.

These statutes as amended appear as §§7831, 7832, 7833, 7835 and 7853, 2 Remington & Ballinger's Code.

It will be noted that under these statutes streets and alleys which are marked upon a plat duly acknowledged and recorded are dedicated without the use of dedicatory language. The statute explicitly so provides with reference to all spaces which are marked as or appear to be streets or alleys, and probably the rule would be the same with respect to any unenclosed place which might appear to serve the purposes of, and be intended as, a park or other public ground, even though not marked as such upon the plat.

1 *Elliott, Roads & Streets* (3rd Ed.), §130.

It follows that so far as dedicatory effect was concerned, the writing upon the plat of Railroad Addition added nothing to the effect of the plat itself so far as the dedication of all the streets shown thereon is concerned. It must then have been placed there for some other purpose. What was it?

The writing in question reads as follows:

“The streets shown upon said plat are dedicated to be used by the public until lawfully vacated, except the strip of land 225.7 feet in width designated as Railroad Street, which is reserved for the tracks and use of said Railroad Company.”

Under the conditions appearing here and the rules of law governing in such cases, no doubt can be entertained as to the purpose of this writing. Prior

to the platting of Railroad Addition, the Northern Pacific Railroad Company had filed its map of definite location showing its main track, the center of its right of way, in the center of the strip of land afterwards indicated on the plat as Railroad Street. If the decisions of this court and of the Supreme Court are authoritative, that operated to fix the right of way so that it embraced the whole of the strip in controversy. It is true the railroad company could abandon the right of way, but unless it did so clearly and unquestionably, the line of its right of way was fixed finally as to its rights and those of the public by the filing of the map of definite location.

*N. P. R. Co. v Murray*, 87 Fed., 648.

*Missouri, etc., Co. v. Cook*, 163 U. S., 491.

Nor was the map of definite location the only thing fixing the right of way of the railroad company in Railroad Street. It is more than probable that the road was actually constructed when the plat was filed, for Simonson, a civil engineer in the employ of the Northern Pacific in those days, testified that he "first went through Spokane in 1880" and that "the railroad was completed at that time" (Record, p. 308). After so many years, probably nothing but record evidence ought to be accepted as fixing positively the relation in time of one event



to another, though Simonson's testimony is borne out by the fact that the plat when filed bore tracings of the tracks and a depot building on Railroad Street, as though they were already established there. However, it is not material whether actual construction preceded the filing of the plat. The right of way was actually fixed by the filing of the map of definite location before the plat was made, or if not, then by the markings upon the plat which showed the right of way established along Railroad Street. It is enough for all the purposes of this question that the railroad company had in one manner or another, or in several fashions, definitely fixed its right of way along Railroad Street before it platted Railroad Addition, and that there has never been any abandonment or surrender of such right of way unless it was accomplished by such platting.

Under these conditions, the writing upon the plat above quoted operated to except Railroad Street from the dedication to public use which was made of all the other streets marked upon the plat, so that no title to nor interest in it passed by virtue of the dedication which would otherwise have been made by the filing of the plat and the dedicatory writing upon it. There was not, as claimed by complainants, a conveyance of the strip to the public

the grant. That, of course, is not the case. The filing of the map of definite location, say this court and the Supreme Court, fixed definitely and finally established the right of way of the Northern Pacific Railroad Company. That right of way was in existence before the plat of Railroad Addition was filed, and it consequently could not be a new right springing into existence from the grant and created by the grant. Under the conditions, however, the words operated clearly and unmistakable as an exception. The marking of Railroad Street as it was marked on the plat and the general dedicatory words would have operated to convey it to the public, just as such marking and such words conveyed all other streets marked on the plat. But here came in the words of exception, whereby there was taken out a part of the thing (the streets) granted, and title retained to the excepted thing in the grantor. This constituted an exception under well established rules of law, not only under the definitions of the text writers, but under the cases appearing in the books.

In *State v. Wilson*, 42 Me., 9, a way had been used by the public for some years before the conveyance of the land across which it was laid. The conveyance contained these words, "reserving to the public the use of the way laid across the same

from the county road to the river.” Held an exception of the way from the conveyance.

In *Wood v. Boyd* (Mass.), 13 N. E., 476, a deed contained this clause, “reserving to the owner of the estate and others adjoining \* \* \* a right of passage way over the within granted premises as specified” in a former deed. This was held to be an exception of the right of way from the conveyance.

In *Bridger v. Pierson*, 45 N. Y., 601, a way was in use prior to a conveyance of the land containing the following clause, “reserving always a right of way as now used on the west side of the above described premises for cattle and carriages from the roadway to the piece of land now owned by R.” Held an exception.

In *Whitaker v. Brown*, 46 Pa. St., 197, a deed in fee of land contained this clause, “saving and reserving nevertheless for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon road to haul coal thereover as wanted.” It was held this was an exception of the coal from the grant.

In *Randall v. Randall*, 59 Me., 338, a deed conveying land contained the following clause, “excepting the reserve of the four rows of apple trees on

the north side of the orchard and the land on which they stand; also so much of the second growth of ash timber as I shall need for my own personal use." This was held no reservation, but an exception.

The gist of the decisions above cited is that wherever land is conveyed with words of limitation upon the grant referring to something already in existence and which does not for the first time arise and issue out of the grant, then the words are considered to be an exception of the thing referred to from the grant and not a reservation of a mere right to use the granted premises, and this regardless of the form of words which may be employed. In the case at bar, the Northern Pacific Railroad Company had established its right of way embracing Railroad Street before the addition was platted. No other effect can be given to the language used than an exception of the strip in controversy from the general grant of the streets marked upon the plat to public use, unless the authorities heretofore cited shall be held unsound.

The construction of the language in question which the law demands is equally demanded by common sense. We shall not follow complainants' counsel through the mazes of casuistry and refined distinctions by which they endeavor to evade the



rule of law just stated. The thought is concealed in varied phrasings, but all the contentions urged come around to these:

1. No right of way existed across section nineteen prior to the filing of the plat, so the right of way was a new thing arising out of and because of the grant.

2. The Railroad Company intended to dedicate Railroad Street to highway use, merely reserving to itself the right to use the highway jointly with the public in a manner not inconsistent with the public use.

The first proposition is not true for one very sufficient reason, that the *Cook* and *Murray* cases stand in the way, and for another, that the plat itself shows the right of way fixed along Railroad Street before the dedication to the public became effective. The second proposition is a mere begging of the question.

The intent of the dedicator only becomes material when such intent is in doubt. The intent of the dedicator can never be in doubt when he has used language which the law considers apt to express a certain intent. If apt language was here used to except Railroad Street from the dedication of all the other open spaces shown on the plat of Railroad

Addition so that no title to such street passed either by the filing of the plat or of the dedicatory words written thereon, there is no more occasion or right to inquire into the intent of the dedicator than to inquire whether by apt words of conveyance it was indeed intended to convey the estate purported to be conveyed. Inflexible rules of law as much forbid resort to extraneous evidence to explain that which needs no explanation in the one case as in the other. The distinction between an exception and a reservation is no mere technicality of the law, but is an established rule of conveying by which the courts determine the effect of a conveyance. But if the question is here supposed to be doubtful so that resort must be had to extraneous evidence to ascertain the intent of the dedicator, then it all points one way, to the intent being to exclude Railroad Street, the right of way of the company, from the dedication, so that no title to the public should pass by virtue of it.

To demonstrate this we invoke first a well established presumption, which is that where issue is joined upon the fact of dedication, the burden of proof to establish the fact lies upon him who asserts it, at least where the dedicator or his privies deny the fact.

“The intention of the owner to dedicate

must be clear, manifest, and unequivocal.”

*Shell v. Paulson*, 23 Wash., 531.

“The intention to dedicate will not be presumed, and the clear intention must appear.”

*Columbia, etc., Co. v. Seattle*, 33 Wash., 519.

“An intention to dedicate will not be presumed, but must clearly appear.”

*Provident Trust Co. v. Spokane*, 63 Wash., 94.

“It is now the settled law of this state that a railroad company may dedicate land which it owns in fee, or in conjunction with the owner of the fee, land in which it has an easement, to the public as a highway. *Green v. Canaan*, 29 Conn., 157. But an intention to do so ought to be manifest. It will not be presumed; on the contrary, in the absence of fraud, or conduct which misleads others, courts will require that it be clearly and satisfactorily proved.”

*Williams v. Ry. Co.*, 39 Conn., 519.

“A dedication is not presumed, but must be shown by the acts and declarations of the owner of such a public and deliberate character as clearly shows an intention on his part to surrender his land for the use of the public, and the burden of proof is on the party asserting such dedication.”

*Hogue v. Albina*, 10 L. R. A., 675.

Aided by this presumption, let us look to the situation of the Northern Pacific Railroad Company when the dedication was made and see if it could have intended to dedicate its right of way unreservedly as a street, save that it would be per-

mitted to maintain its tracks thereon, as shown on the plat, which is what complainants assert was its purpose.

Complainants introduced evidence tending to establish that the plat of Railroad Addition was a standard form, one which was used in platting town-sites and additions to towns along its system wherever the conditions were similar to those in Spokane Falls. Knowing the tendency to standardize which exists among railroad companies in dealing with their lands, it may be presumed that this was one of the standard forms of the company. If so, it, of course, was prepared under the advice of counsel learned in the law. If we suppose that these counsel believed in 1881 that the Northern Pacific Railroad Company could deal with its right of way as it chose, they nevertheless may not be presumed ignorant of every other rule of law applicable to the situation, nor may it be presumed that the officials of the railroad company were blind to the practical considerations which would influence the situation. The dedicator knew, then, because the statutes of Washington territory explicitly so provided, that the dedication of a strip of land for highway purposes operated as a deed to the land for such purposes, and that it thereby passed from the ownership and control of the dedicator and vested in the



municipal authorities. It must have known, also, that the street use would be paramount to railroad use if a dedication was made, and that the manner of railroad operation, if not the right to operate in any manner at all, would rest with the corporate authorities. It must have known that if it granted the street to public use, it could not reserve any right to use it in a manner inconsistent with the public use. It must have understood the thousand annoyances, embarrassments and positive obstructions to railroad operations which were bound to result from having the main track of a transcontinental railroad, with its necessary sidetracks and depot buildings, in a public highway, even though that highway was in a small town, and even though they supposed it could by no possibility ever be anything but a small town. Every incentive forbade it to dedicate its right of way, tracks and depot buildings for street use, and none impelled it so to act. If, as counsel suggest, an open space along its tracks then seemed desirable, what need was there to dedicate such open space as a street in order to secure the advantages of the open space? By leaving the space where it might be used by the public with the consent of the company, and with the power to take it from the public when the needs of the company should require, it would obtain all the

benefits which counsel suggest, burdened by none of the very apparent disadvantages which would result from the dedication of the space as a street. Counsel, of course, would put the Northern Pacific officials of those days in an unseeing class which neither appreciated the possibilities of the country into which they were constructing the road, nor supposed that conditions would ever change from those then existing. It might be questioned why it was then that they were constructing a railroad into the country, for, clearly, if vast possibilities were not present, and if they did not anticipate an extraordinary change in conditions following the construction of the railroad, the railroad would never have been constructed. It would be as sensible to deny to Congress foresight concerning the possibilities of the country and what might be anticipated with the construction of a railroad as to deny such foresight to the constructors of the railroad. But however blind they were to the possibilities of the future, no reason could have occurred to them for dedicating the right of way as a street, while every practical consideration forbade them so to act.

With the ordinary presumption against the intent to dedicate much strengthened by the obvious disadvantages of dedicating the right of way to highway purposes, let us study the language deter-

minative of this question before passing to the authorities dealing with analogous cases.

Some effect, as we have said, must be given the language. It must be presumed, in view of the circumstances surrounding this dedication, that it was used understandingly and for some definite purpose. This definite purpose was evidently to fix the status of Railroad Street, for there was no occasion to use such language with respect to any other part of the plat, all the streets shown upon the plat being dedicated by the mere marking of them upon the plat, and being furthermore dedicated by the general granting words written thereon.

Now, what was provided? The streets shown upon the plat, it is provided, "are dedicated to be used by the public" except the strip of land "designated as Railroad Street which is reserved for the tracks and use of said Railroad Company." Reserved from what? Why, plainly, from the use of the public. Reserved for what purpose? Just as plainly, for the uses of the company. How may such language be construed to express an intent that it, too, was devoted to the public use, the railroad company retaining no more than a right to use it jointly with the public to the extent that its use would not be inconsistent with the public use? Yet if complainants' theory is accepted, this language

must be construed to give the public entire dominion over the strip, reserving to the company the mere right to use it for railroad purposes in such manner as should not interfere with the right of the public to use it for general public travel.

The language is significant in another fashion. "The streets shown upon said plat are dedicated to be used by the public \* \* \* except the strip of land 225.7 feet in width designated as Railroad Street, which is reserved for the tracks and use of said Railroad Company." If the strip in controversy was intended to be a street with all the incidents attaching to all the other streets in the addition, reserving only the right to use it for railway purposes, why this circumlocution in expression? Why was it not said "except Railroad Street," instead of "except the strip of land 225.7 feet in width designated as Railroad Street"? If the intent was that claimed by complainants, why was it not expressed in simple direct language, "the right is reserved to use Railroad Street for railroad purposes"? Surely the high officials of the railroad company and their able legal advisers possessed sufficient command of the English language to express a simple thought in plain language. If the strip marked upon the plat as a street was intended to be a street, why did they not call it so, instead



of going around Robin Hood's barn to call it "the strip of land 225.7 feet in width designated as Railroad Street," and if it was intended to dedicate Railroad Street as a street with all the other streets in the addition, reserving only the right to use it for railroad purposes, would it not have been much more natural to have provided: "The streets shown upon said plat are dedicated to be used by the public until lawfully vacated, the right to use Railroad Street for railroad purposes being reserved."

It may be said that we attach too much importance to the particular language used, for that the dedicator may not have considered carefully the language employed, but have expressed itself in loose fashion. Such a criticism of our position can come with no good grace from complainants' counsel, who are insisting so strenuously upon the great importance which must be attached to the labeling of the strip in controversy "Railroad Street" upon the plat. Nor do we think it is justifiable from any standpoint. We are seeking now to arrive at the intent of the dedicator by construing its language. What reason is there for doing violence to this language in order to impute to it one meaning when the natural construction of it gives to it another meaning? Why not adopt the natural instead of the forced? Possibly there might be some justifi-

cation in so doing if the rule of law was that the dedication was to be presumed, if possible, and every presumption was to run against the dedicator. We have seen, however, the rule of law is otherwise. Where the presumption of the law demands a certain construction, where the situation of the dedicator demands the same construction, and where the language itself can bear no different construction unless violence be done it, what excuse can there be for arriving at a different meaning by putting a forced and unnatural construction upon it? Is it not more rational to ascribe to the dedicator the ability to use the English language to express its intent in natural fashion rather than to suppose it incapable of expressing itself clearly and directly?

Turning to court decisions dealing with analogous cases, we take up first Washington cases, since these construing the ruling statutes are ruling in so far as the cases are analogous to the case at bar.

In *Robinson v. Coffin*, 2 W. T., 251, the controversy was with respect to a long strip of land eighty feet in width abutting at one end upon a street at right angles to it and at the other end upon the end of a street in direct line with it, and also eighty feet in width, and upon another street at right angles to it. It separated two blocks of platted lots.

The strip was not described as a street, or in any other way save that it bore the letter "C." It was held that an intent to dedicate the strip as a street could not be imputed to the dedicator, though "it is true that it might well serve as a convenient street for access to the lots abutting it," and though "the lots, if it be not a street, are indeed without any way of approach."

In *Columbia etc. Co. v. Seattle*, 33 Wash., 513, a dedication as a street of an open space shown upon a plat was sought to be established by differences in markings and other indications. This was held not sufficient to establish the "clear intention" to dedicate which must appear.

Nearly akin to the case at bar so far as this question is concerned is *Provident Trust Co. v. Spokane*, 63 Wash., 92. There a plat was filed upon which a street was marked with a strip along one side of it, apparently separating it from the platted ground, which was marked "R. R." The legend on the plat contained proper dedicatory words, as here, and then: "We reserve, however, the strip of land twenty feet in width marked 'R. R.' for railway purposes, also the exclusive rights in all of said streets to lay down pipes and carry water and gas through same." It was held that the strip referred to was not dedicated as part of the street.

It seems to us that the above case rules the present. Railroad Street is no more definitely marked as a street upon the plat of Railroad Addition than was the strip "R. R." upon the plat there considered. The words of dedication were as positive in the one case as in the other. And if on the plat of Railroad Addition Railroad Street was referred to by implication as a street when it was said "the streets shown upon said plat are dedicated \* \* except the strip of land \* \* designated as Railroad Street," like implication appears in the other plat. There it was provided "we do \* \* \* dedicate as public highways the streets" marked on the plat, but "reserve, however, the strip of land twenty feet in width marked 'R. R.' for railway purposes." Followed then words purporting to reserve the right to lay pipes in all the streets, another inclusion by implication of the 'R. R.' strip with the streets. The language, too, smacked as strongly of reservation as opposed to exception as language could. Yet it was held the whole plat showed an intention to except the strip "R. R." from the general dedication to street use. Why shall not the case rule here?

A plat was filed under a statute substantially like that of Washington Territory. It showed a block of ground surrounded by streets, upon which was



written "this park is reserved from public use, and title kept in proprietors." It was sought to hold this as a dedication, but the courts held otherwise.

"To what public use did the proprietors devote this parcel of land? They say on the face of the plat: 'This park is reserved from public use, and title kept in the proprietors.' This statement is, in effect, repeated in the acknowledgment. They not only say the title is kept in themselves, which would have passed to the county had the square been devoted to public use, but they say the property is reserved from public use. Stronger language could not have been used to show that they did not, and did not intend to, devote the parcel of land to public use. This statement completely overcomes any inference that might have been drawn had no statement been made, or had the word 'park,' only, appeared upon the face of the plat. But the contention seems to be in effect, if not in terms, that we should strike out and disregard all this statement after the word 'park.' We know of no rule of law, ancient or modern, which gives to the courts power to deal with contracts in any such a way. We must take the statement as a whole; and when that is done it is shown beyond all doubt that the square was not, by the plat, devoted to public use."

*Baker v. Vanderburg* (Mo.), 12 S. W., 462.

The facts in the cited case are no more conclusive against dedication than they are in the case at bar. Here the dedicator first says "the streets shown upon said plat are dedicated to be used by the public," then qualifies the grant by

providing that Railroad Street is not dedicated to the use of the public, but is "reserved for the tracks and use" of the dedicator.

A very strong case in this connection is *Duluth v. Railway Co.* (Minn.), 51 N. W., 1163. Upon a plat a street was shown. Extending along this street for its whole distance was a light black line. Forty feet south of it and running parallel with it was a heavy black line, thus leaving a strip forty feet in width along the southerly line of the street. At one end of the street the light black line was joined by a cross line with the heavy black line. At the other end it was left open. This strip was in no way marked to indicate its character, and the question was whether it was intended to be dedicated as a part of the street, that is to say, whether the light black line or the heavy black line was the southerly line of the street. First remarking upon the principle which rules all cases where the question of dedication is involved, *viz.*, that the intention of the dedicator controls and that in ascertaining that intention every part of the plat must be looked to and all its parts be given effect, the court said:

"In construing the plat, as respects the extent of the dedication thereby made, and

the extent of the corresponding relinquishment by the dedicator of his property rights, it is necessary to consider particularly the effect of the lines inclosing the narrow strip of land south of Dock street. The principle, applicable generally in the construction of written instruments, which forbids that any part to which meaning and effect can reasonably be ascribed shall be regarded as meaningless, is applicable here; and these lines on the plat are not to be rejected as evincing no intention on the part of the dedicator, and as having no reasonable effect."

Deducing from the whole plat that the dedicator did not intend to dedicate the strip referred to as a part of the street, the court said:

"Nor can this inclosed space be deemed to be a street or public way contiguous to Dock street, and separated from it only by an imaginary line. That would make the northerly line of this strip entirely meaningless, and of no effect, unless to conceal or obscure, not to express, the intention. Nor is there anything indicative of an intention to appropriate this tract to any public purpose other than that of a street. If it had been so intended, the purpose to which it was devoted would have been in some way shown. Yet these lines were drawn, and the inclosure made, for some purpose connected with the platting and dedication; and if it was not to mark this strip as being given for some public use, it is natural to suppose that it was to denote that it was intended for the private purposes of the dedicator, or to limit the extent of the dedication for public use. It does not appear what particular

private use the proprietor intended to make of it, nor is that necessary. It is enough that the intention was manifested on the plat, as we think it was, to reserve or withhold it from use for streets or other public purposes; or, in other words, not to include it in the dedication made for such purposes."

In *Lever v. Grant* (Mich.), 102 N. W., 848, a plat showed a street with dotted lines running along one side of it between it and lots and blocks which would otherwise have abutted upon it, the strip so segregated being marked "private way." The legend on the plat contained appropriate dedicatory words of the streets and alleys shown on the plat, with these words following: "except the north thirty feet of Custer Avenue, which we reserve as a private way." It was held that by such language the dedicators excepted the strip shown as a private way from the dedication. Similar in effect is *Detroit v. Myers* (Mich.), 116 N. W., 621.

For other cases where, under varying conditions, it was held no intent to dedicate appeared, see:

*Town of Mt. Vernon v. Young* (Iowa), 100 N. W., 694.

*McLean v. Iron Works* (Calif.), 83 Pac., 1082.

*Matter of New York*, 82 N. Y. S., 417.

Several of the foregoing cases bear squarely



upon the point of which complainants' counsel seek to make so much, *viz.*, that if Railroad Street was not intended to be dedicated as a street, the lots abutting thereon would be left without other means of access than the alleys in their rear. The same condition appears in the cited cases, except that in some of them no means of access to the lots was left, yet this fact was held not sufficient to establish an intent to dedicate.

Much is attempted to be made of the so-called "practical construction" put upon the instrument by the railroad company and the public during the period for some years after the platting of the addition, it being claimed that during those years Railroad Street was used as a street by the public with the consent of the railroad company. We shall not answer this argument at length under this head for the reason that everything which is urged by complainants as a practical construction by the parties is urged by them under the next head wherein they claim a common law dedication of the street by user. It suffices here to say that the authorities which we shall cite under the next succeeding head show how very usual it is for railroad companies to permit the public the use of their lands not at the

moment needed by them for railroad purposes for street purposes, it being convenient to railroad companies and the public alike that the lands should be so used until the railroad companies needed them, and it will appear from those authorities that the courts have never held such use, even under circumstances more compelling than those upon which complainants here rely, to be an implied dedication. The use has always been held to be permissive and to vest no right in the public. It need only be remarked here that the evidence most overwhelmingly establishes that whatever use was made of Railroad Street by the public was the same use which was made of all other vacant ground in the village of Spokane Falls, during the period in question, whenever the convenience of the public required such use, and that the railroad company permitted it merely because it then had no use for the vacant strip, and its operations were in no way interfered with by the character of use which was made of it. It will appear clearly, also, that as the railroad company needed the strip it occupied it without any question ever having been made of its right to do so, and that the City of Spokane has ever recognized the company's right to do with Railroad Street as its private property as it pleased.

We shall reserve for the next head, also, remark upon the controversies and litigation in early days between the people of Spokane and the railroad company concerning the company's right to erect buildings in Railroad Street where they would block the intersecting streets. These show that the people of Spokane in general, and complainants' senior counsel in particular, did not in the '80s and '90s possess the lively imagination which marks the complainants' testimony and contention here. Some trifling little incidents like the inclusion of Railroad Street as the private right of way of the company in assessment districts created for the purpose of defraying the expense of paving intersecting streets; its taxation for general revenue purposes as the company's property, and the payment of both special assessments and general taxes thereon, will also then be adverted to.

Considerable space in complainants' brief is devoted to the wrong of the railroad company in labeling Railroad Street as a street if it was not intended to be a street, it being urged that intending purchasers would see and be impressed by the conspicuous designation of the street, but would not note the script in the corner of the plat by which the street was excepted from

the dedication. The legal bearing of this phase is not pointed out, and we are unable to see any. However, we suppose if one purchases by reference to a plat one is bound by all the information conveyed by the plat, and if one purchases in view of the conditions appearing upon the ground one is bound by all the information which is obtainable from a view of the ground. The plat showed upon its face that Railroad Addition was platted by the Northern Pacific Railroad Company, and that the tracks and depot of that company were in Railroad Street. The ground itself showed the same things. The Northern Pacific Railroad was something of a factor not only in Spokane Falls but in the whole Northwest at that time, and we imagine that the people of that section were fairly familiar with the terms of its grant. Whether they were or no they were charged with notice of it.

“In this case, by act of congress, a strip of land four hundred feet wide was granted to the Northern Pacific Railroad Company. This was not only a public act, but it was a notorious one. Knowledge of this act must be imputed to every intelligent person in communities where the Northern Pacific railroad is projected. It is a matter universally noticed and talked about. It is a matter of common knowledge that the right of way of railroad companies is not limited to the



amount of land actually occupied by their tracks; and it seems to us that purchasers of any portion of the right of way which was granted by public statute were put upon inquiry concerning the equitable title to such land."

*Dennis v. N. P. R. Co.*, 20 Wash., 334.

Every one who purchased lots in Railroad Addition knew, then, that Railroad Street was a part of the right of way of the Northern Pacific Railroad Company, and that the company was using and intended to use at least a part of it for all its necessary right of way purposes. This was certainly sufficient to impress all intending purchasers with notice of the full extent of the company's rights in Railroad Street. As was further said in the *Dennis Case*, *supra*.

"We have no doubt that they did possess this knowledge; that they knew that the track and road bed were there, and that the road was operated there; and, having that knowledge, the law imputes to them the further knowledge of the true ownership of the land. It was sufficient, at least, under all the authorities, to have placed them on inquiry, and such inquiry would have resulted in the knowledge that the railroad company was the claimant and owner of the land in question."

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In view of the presumption in which the law indulges, and the plain words of exception by which Railroad Street was segregated from the

general description of the streets dedicated and removed from the operation of the grant, we cannot think there is occasion for or right in the courts to inquire into the intention of the dedicator. If it shall be said, however, that there is ambiguity present, then the intention of the dedicator must be arrived at, for its intent rules. In ascertaining that intent, the courts cannot look alone to the fact that a certain strip of land was by the dedicator dubbed Railroad Street, and it be therefrom said that it necessarily was thus made a street. Like every other instrument from which must be deduced the intent of the person who executed it, the plat must be looked at from every side, within its four corners, and the same effect must be given to one part of it as is given to any other part. *Duluth v. Ry. Co.*, 51 N. W. 1163. The court must look, too, at the situation of the dedicator and judge from that the likelihood of the one act rather than of the other. Very cogent in this connection is the language of Judge Rudkin in his opinion ordering the dismissal of this case:

“There is no magic in the use of the word ‘street.’ The entire plat, including the dedication, must be construed together, and when so construed it plainly appears that the strip of land, ill-advisedly designated as a street, was in fact excepted from the dedication and reserved for the tracks and use of the railway

company. It is no doubt true that the use of a strip of land as a mere right of way for a railroad is not entirely incompatible with the use of the same strip of land as a public street, but at the same time its use for other legitimate railroad purposes would be. Furthermore, such common user is so impracticable and so hazardous that a court should not readily presume that it was authorized or intended. The use made of this strip of land from 1881 to 1889 was but natural under the circumstances and was wholly insufficient of itself to constitute a common law dedication." (Record, 366.)

In view of these considerations, it is difficult to see how there may be deduced the "clear, manifest and unequivocal" intent of the owner to dedicate the street which must appear before the dedication may be declared. *Vide* Washington decisions heretofore cited.

Another thought is suggested in complainants' brief which is refuted with admirable effect in Judge Rudkin's opinion:

"The sale of lots with reference to the plat in question does not create an estoppel. For while the plat showed Railroad Street it also showed plainly that it was not a street in fact. but was excepted and reserved for the tracks and use of the railway company. Indeed it would be far easier to raise an estoppel against the property owners who have stood by during all these years while permanent and lasting improvements were under way at great expense on property which they now

lay claim to as a public street." (Record, 367-368.)

Another consideration might have been added to that referred to in the portion of the opinion just quoted which operates strongly as an estoppel against all these complainants whose property abut upon the intersecting streets, noticeably against the complainants Turner and Shinn, whose property lies for such a distance along Howard Street on either side of Railroad Street. It appears from the testimony that all the intersecting streets in Railroad Addition have from time to time been improved and finally paved, as city streets are. Local improvement districts were created to bear the burden of such improvement and paving, and Railroad Street where it abutted upon each side of the intersecting streets was included in the several assessment districts as the private right of way of the Northern Pacific Railroad Company, and it was required to and did pay taxes upon such portions of what is said to be Railroad Street as its private right of way, as its part of the burden of improving and paving the intersecting streets. The complainants owning property abutting upon these streets received the benefit of such action, for had the municipality treated Railroad Street as a street, then, of course, the



Northern Pacific Railroad Company could not have been called upon to bear any part of the burden of paving the intersecting streets, and the burden of such paving would have been by so much the heavier upon abutting owners. These gentlemen who are now so concerned because the City of Spokane does not claim that Railroad Street is a street were very much pleased when, to the advantage of their pocketbooks, the City of Spokane in the past considered Railroad Street not to be a street, and taxed it to bear the burden of paving the intersecting streets upon the theory that it was the private property of the Northern Pacific Railroad Company. Estoppel under such circumstances ought to be invoked against these complainants, if it may ever be invoked in such a case.

#### IV.

##### *Common Law Dedication.*

The same evidence which complainants' counsel relied upon under the preceding head as a practical construction of the plat to establish the dedication of Railroad Street is relied upon to establish a common law dedication of the street. It is as ineffective for one purpose as for the other, not more convincing for one than for the other.

The evidence reflects such a condition as one would expect where there has been such a kaleidoscopic change in circumstances from 1881 to 1913 as is here apparent. It shows a great transcontinental railroad, built under the encouragement and with the aid of Congress in order that a vast undeveloped country might be made accessible and so be populated, constructed through one of the small villages which were the sole urban communities along the line of the railroad at that time. Some of those communities the railroad officials undoubtedly expected would grow into cities, though, of course, they could not guess for which such fortune was reserved. So in Spokane Falls, Cheney, Sprague, Ritzville, no doubt in every other village through which their line lay, the towns were platted along the right of way in uniform fashion. In all those cases there was reserved a width of 225 feet of the right of way along the main track of the railroad which was called "Railroad Street," it being provided in all such cases that this strip was reserved for railroad tracks and uses. That strip was ample for such purposes, as experience has shown, though the villages grew into cities. In 1881 and for many years afterwards, it was vastly in excess of the company's needs even in the

communities which most rapidly grew. During this formative period, the strip was used by any person who found it convenient to do so for any desired purpose so long as such use was not inconsistent with all the desired railroad uses. The semi-public use of such strip continued until it became inconsistent with the railroad use, and then it was by the railroad company abrogated. Such use in the communities which did not grow continues down to the present time. In Spokane it continued for a number of years, gradually being decreased as the needs of the railroad company increased, and being finally put an end to a number of years ago. Always and everywhere this early semi-public use and the subsequent resumption of possession by the railroad company as its needs required has gone forward without let or hindrance, and without anyone, until the commencement of this action, dreaming that the railroad company was otherwise than strictly within its rights in taking possession of the strip and ousting the public use thereof as fast as it needed it. The evidence goes further than that and shows that in the minds of the old-timers who testified in this case, and of some of the counsel who now urge most vigorously that the action of the railroad company was unauthorized,

there was never any thought that Railroad Street was ever dedicated as a street, either by statutory or common law dedication, until some lively imagination suggested the theory now urged. The conduct of the people of Spokane Falls, and the conduct of complainants' senior counsel in the early days, when if it had been dreamed Railroad Street was a street it would have been most vehemently urged because then freshest in mind, disprove any claim which may be made of a street dedication.

Turning now to the evidence. In 1881 Spokane Falls was a village of between 300 and 400 people (227). By 1889, just before the great fire which wasted Spokane, it had grown to a population of about 10,000 (225). It has a population now of considerably over 100,000. Built in a valley along a mountain stream, the natural topography of the townsite varies greatly, some portions being level, gravelly ground and other portions being extremely rough and broken with basaltic rock out-croppings. Wherever these occur, the streets must be graded before there can be travel thereover. Down to as late as 1889, though Spokane Falls had then grown to a town of considerable size, there had been little grading of the streets. Gandy, complainants' principal witness, testified "at the time of the fire in 1889 the town had close on to 10,000, between



9,000 and 10,000. First avenue had not been graded at the time of the fire; some grading had been done on Howard street clear over to Second. I don't think any of the cross streets had been graded across the track. Some grading was done on Second avenue very early. No cross streets had been graded to the south of the track except Howard" (227-228). Newbery, called by defendant, testified: "There were no graded streets in Spokane in 1884. By 1886, Riverside avenue had been graded some, I think. I think Riverside was the first graded street, and possibly Howard. \* \* \* You see, there were so much of these things wide open, and the streets were not graded, and it would be pretty hard to say just where a house was. The only place where there was a graded street at all was Riverside avenue" (315).

It may be said in this connection that Second avenue is the first street south of Railroad Street and running parallel with it, while on the north and running parallel with it in the order named are First avenue, Sprague avenue, and Riverside avenue. The intersecting streets principally referred to, running from west to east in the order named, are Monroe, Lincoln, Post, Mill, Howard, and Stevens. First avenue was one of the rocky streets not graded, while Railroad avenue lay along

one of the level, gravelly strips in the city, and whatever of rock out-croppings there might have been there had, of course, been smoothed off in the grading for the right of way. Testified Gandy in this connection:

“First avenue was in the same condition then. It was full of rock and was not cleared off for several years afterwards. But Railroad avenue not having any rocks in it at all, was used as the principal street on account of its being free from rocks. The travel was principally there on account of its being a free open street, while First avenue was filled with rocks” (223).

And again this witness says:

“The railroad right of way all through was flat, level, and gravelly, no obstruction to travel in it” (228).

Shinn, one of the complainants, testified:

“They traveled along Railroad Street promiscuously, now on one side and now on the other. They could not cross over the tracks except at Howard and Post, the only streets open. They could not cross over the tracks very well with a team; a person afoot could. In traveling along, at times you might be on Railroad Street, and other times on private ground. They generally followed the line of the railroad. They might be on the street line of the lots or might be on the street line of Railroad Street, but they were never liable to be off the right of way because that was graded—I wouldn’t call it graded, but it was smoothed off so that you could drive along.”

“Mr. Graves: The railroad kept it in better condition for people to cross to the depot; is that it?”

“I guess they kept it in better condition for their own use and not the public. In traveling, sometimes they might be on the street and sometimes on private ground. They drove principally on the railroad on the two lines here (indicating), this was their principal drive.”

As might be expected under the circumstances, travel was not confined to the streets anywhere in the village, but followed the line of least resistance, and this continued until the streets began to be graded and the building of houses began to force travel into street lines. The witness Nash for complainants testified:

“The photograph shown here fairly represents conditions as they then were—about the time the railroad came. It shows some level ground, a lot of rocks and a lot of trees. People rode and drove where they chose. As the town grew up and places were fenced, we were confined to particular places. They traveled wherever they pleased until they were forced out. This came to an end in 1887 to 1889. About this time they had been pretty well confined to streets. There were lots of rocks and big hummocks all around, but not on the north side of the railroad. There were some small rocks there, but they did not interfere with travel.”

During the early '80s the business district was on lower Howard street, from Front avenue south

(221). Front avenue is not shown upon the plat of Railroad Addition, and it may be said in explanation that it is the fifth street north from Railroad Street, the streets intervening being in the order named First, Sprague, Riverside, Main, and Front. The depot building, it will be seen by reference to the plat, was on the east side of Lincoln street, three blocks west of Howard street. The travel from the business district was down Howard to Railroad Street, and then along it to the depot (220-222). As Mr. Drumheller, one of complainants' witnesses, said, "As to the condition of Railroad Street from the time it was platted down to 1889, practically all the travel and traffic from the main part of town went down Howard street to the track, and then down Railroad Street to the depot, backwards and forwards" (269). Cook, for the defendant, testified: "In a business way the center of town in 1883 and 4 was at Howard and Main. During these years, in proceeding to the depot we went up Howard and then down on the south side of the depot. If we went afoot or horseback we cut across. The depot was west of Howard. We went where there was no resistance, and went that way up to the time of the fire" (316-317).

Not only did the public in traveling from one



place in the village to another have no definite route marked, but there was no definite line of travel along Railroad Street. Testified Gandy:

“All that tier of blocks, like Railroad Street, was level, flat, gravel ground. There was no line of demarcation between the north line of those blocks and the right of way of the railroad, nothing at all. There were stakes set by the surveyors in front of our lots. On the south side people just drove along there promiscuously, either on the right of way or on the north tier of blocks where there were no buildings” (229).

Drumbeller, for complainants, testified:

“Up to the fire I think the business center was not far from Main and Howard, that is, three blocks north of the railroad track. It centered on north and south streets, mostly on Howard. In those days there was a little travel everywhere and anywhere on the right of way; up to the time the town began to build up they usually went as they pleased” (270).

Newbery, for defendant, testified:

“As to travel along the railroad right of way during the year 1883 and along there to 1889, anybody went pretty near anywhere they wanted to; they traveled along the right of way and whenever the cars happened to stop to discharge freight or anything of that kind they would drive up to them. It was not a graded street or anything of that kind, but we never followed any street when we came from downtown going home” (313).

Cook, for defendant, testified:

“From that time to the fire we traveled most anywhere. There wasn’t any obstruction anywhere over the country. If there was a building or a line of buildings we went around them. There was nothing on this side to indicate streets much, except Howard, up to the time of the fire, and after. I lived always on the hill south of the tracks.”

Glasgow, for the defendant, testified:

“As to the condition of the right of way from the time I came here in ’85 there were no streets; you could drive anywhere except where the rails were laid. There were really no streets; didn’t know where the streets were. This was true for several years up to ’85 or 6 when Post street was opened through. Howard street was opened through also before that. Between 1882 and 5 the railroad right of way had some warehouses on it on both sides. As to driving we used to unload our wheat, the cars would be standing on the side track and we would drive in and unload on what we called the team track. These team tracks were situated between 1883 and 1885 between Howard and Monroe. I don’t remember how many tracks. The right of way was not used by the public in general unless they had business on the railroad tracks; that was what we used it for. If I were proceeding from the depot there in 1883 or 4 down to Main and Howard, on foot, or horseback, I would cut across these different blocks where Davenport’s hotel is being built, and upon the street, angling through it between blocks. With a team I would take the same course. This course of travel ceased as from year to year there would be new

buildings stuck up somewhere that would finally throw them around into the street.”

The houses which were built along the right of way, of which so much is attempted to be made, it develops were insignificant little affairs. Gandy, defendant's witness, testifying they were wooden buildings, most of them one story in height, though one or two were two story buildings (221), while the witness Thwaite said they were one and two story buildings, used for lodging houses, some saloons, fruit stand, lunch counter, etc. (273). Glasgow, defendant's witness, stated that he remembered “a couple of little buildings opposite, hot-cake joints” (320). The witness Johnson, speaking of the buildings, said: “There might have been a few shacks around there” (343).

The public use of the strip in controversy as outlined by the testimony above referred to is clearly not sufficient to establish a highway by adverse user, for the use shown is on its face permissive in character, has no suggestion of adverse use, and does not possess the requisite factors of continuity in time and precision and certainty of travel without which there is no establishing a street by adverse user. The authorities we shall hereafter refer to make that clear, but before going to them we wish to remark

upon the practical construction of the situation by the railroad and the municipality and its citizens during the whole period from the filing of the plat down to the present time, for the evidence in that behalf renders it impossible to hold Railroad Street to have been dedicated to highway uses.

Railroad Street is shown on the plat 225 feet in width. It was occupied at the first by the main track, two sidings, and the combined passenger and freight depot of the company. Another building used for a freight warehouse alone was built on the strip in 1882. As the business of the company increased, additional tracks were from time to time put down, no one taking any account of the periods of construction or where they were placed. After the fire in 1889, the company rebuilt its depot buildings in Railroad Street, put down additional tracks wherever needed, and because of the destruction of so much of the warehouse and storage room in the town, used its cars and tracks largely for storage purposes. About the same time it began to lease portions of the strip in controversy along the north side thereof for warehouse purposes. Such leasing has continued ever since as fast as it could secure applications for that purpose, and at the



present time the north 100 feet of Railroad Street, as it was platted, is occupied solidly by large brick wholesale and ware houses, leaving but 125 feet of the original 225 which is used for railroad operation. These buildings cover "a good portion" of "a well defined private way" which Gandy testified once was in Railroad Street (229). It is not pretended that any objection was made by the municipality or the public generally to the company occupying Railroad Street as it pleased with its tracks or buildings. The only objection ever made, as will be noted later, was to the company constructing permanent buildings on Railroad Street across the intersecting streets.

In the examination of witnesses and in their brief, complainants' counsel euphemistically refer to the laying of tracks on the street wherever the company pleased and to the erection of permanent buildings upon the street as "encroachments" thereupon. We suppose the term which may be applied to these acts will not greatly alter their character and effect. Here is a strip of land which it is endeavored to establish as one of the principal streets of Spokane from the birth of the place, and it appears that the railroad company has from the beginning occupied the so-called street with tracks and buildings as it pleased, and

has used it for any other railroad purpose it chose without objection from municipality or individual. Something more than euphemism is required to deprive such acts of their determinative effect.

It is said the railroad company never obstructed the use of the street or gave any intimation that it was not a street just as were all the other streets in Railroad Addition. The construction of a passenger and freight depot in the so-called street in 1880 or 1881 of a freight depot in 1882, of tracks whenever and wherever desired, of new depot buildings after the fire, the use of the street for storage purposes as desired, and the building up solidly of 100 feet along its north side for its entire distance with great brick buildings, would seem something of an obstruction of it for street uses and a slight intimation that the railroad company did not consider it to be a street. Furthermore, the witness Cook testified:

“With the exception of one warehouse on the south side of the track, prior to the fire, there was nothing to hinder people from driving along the south side of the track from Washington street west for several blocks, and they did drive there. I did not travel that way myself very often after I was told not to. A man named Pond, who was roadmaster, stopped me once some time in 1883 or 84. I was down at the warehouse I have just re-

ferred to, on the south side near Post and Mill. I was going down there to haul some machinery. I went in there because it was handy. The machinery was pretty heavy to lift, and I didn't want to take it through the warehouse. Mr. Pond saw me before I got away with it. He made me drive around the warehouse and take it through—take it out of the back end of the warehouse, instead of the front" (318).

This too would seem a slight intimation from the railroad company that its right of way was not a street which the public were free to use as they pleased.

There seems, likewise, to have been a remarkable consensus of opinion on the part of municipality, citizens, and railroad that it was not a street. The acts of early days convict some estimable gentlemen of considerable forgetfulness, apparently, when they now testify as to what was understood then. The increasing business of the company necessitated the construction of a freight warehouse in 1882, as above remarked, which was planned to be constructed in Railroad Street and across Post Street, one of the intersecting streets of Railroad Addition. The work was objected to by the people of Spokane, not because the building was on Railroad Street, but because it was across Post Street. Testified Johnson, one of

complainants' witnesses, who constructed the building:

"The reason I know the foundation for the freight depot was built across Post Street is because a committee of citizens of Spokane stopped me from building; said I was building across the street; and I telegraphed to Sprague, and they made me take thirty feet off that and put it on the east end. That moved it east of Post Street—cleared the street."

It is rather remarkable that if the people of Spokane in 1882 believed that Railroad Street was a public highway, the same objection was not made to putting the freight building in the middle of that street that there was to the placing of it in the middle of Post Street.

No further controversy arose concerning the railroad company's right to use Railroad Street as it pleased until several years after the fire of 1889. A new freight depot was built two blocks long, reaching from Howard west to Post.

"We objected very seriously to obstructing Mill Street \* \* \* They never took it down until the court compelled them to" (Gandy, 231).

Upon these objections there followed in 1892 the litigation between the Northern Pacific Railroad Company and the City of Spokane which is reported in 52 Fed., 428; 56 Fed., 915; 64



Fed., 506. The nature of the conflicting claims which occasioned that litigation is thus stated in 52 Fed.:

“The complainant, for the transaction of its freight business at the city of Spokane, has in use a cheaply constructed wooden warehouse, situated within the limits of its right of way. This structure was only designed for temporary use, and was hastily built immediately after the conflagration which occurred on the 4th of August, 1889, and is upon the site of the freight depot theretofore in use, and which was consumed in said conflagration. There is a controversy between the railroad company and the City of Spokane as to the title to part of the ground covered by said warehouse, the railroad company claiming that its title is perfect, and the city claiming that, by act of the railroad company, part of the ground covered by it was dedicated to the public for a street; that it is an obstruction of a public street, and therefore a nuisance, and on that ground the officers of the city propose to tear it down, and also to prevent the railroad company from erecting a new freight depot covering any part of the ground within the limits of the alleged street.”

The controverted points were thus enlarged upon in the 56th Fed. when the final decree was rendered below:

“The question in the case is whether Mill street in the City of Spokane is a continuous thoroughfare across the right of way of the Northern Pacific Railway, or across Railroad street, in which the tracks of said railway are

laid, or whether said Mill street is interrupted so that the area within the lines of said street extended across the right of way is private property, to which the Northern Pacific Railroad Company has the exclusive right." \* \* \*

"Said plat shows Mill street extending continuously across Railroad street, and the evidence in the case shows the same to be a continuation of Mill street in the original town. \* \* \*

"There is no rule or reason to support the contention of the complainant that by the inscription on the plat an exception is made of Railroad street, so that the streets at right angles therewith terminate at the margins thereof. The marginal lines of Railroad street upon the plat are not extended across the intersecting streets. The area of the intersection of the two streets appears to be as much a part of Mill street as of Railroad street, and there is nothing upon the plat indicating an exception or reservation of any part of Mill street, nor of an intention that said area should not be a place for people to cross the company's right of way and tracks. \* \* \*

"I assent to the proposition that the corporation cannot lawfully dispose of its right of way granted by congress, so as to defeat the purpose of congress in making the grant. But certainly the railroad was intended to be a public benefit and aid to the development of the country, and not to be a barrier. It was contemplated that towns and cities would grow up along its line and that the coming and going of people to and from the company's depots and stations, and the transaction of business there, would necessitate the location of streets crossing the right of way. The grant is sufficiently liberal to admit of such

crossings without crippling the railroad or impairing its usefulness. I think that the dedication of the streets in Railroad addition cannot be held to be ultra vires, consistently with a reasonable construction of the act creating the Northern Pacific Railroad Company. Its officers have not so construed the franchise in transacting the company's land business. When the plat was made, Spokane was but a prospective city, and energetic people have since made it an actual city, covering a large territory on both sides of Railroad street. To now cut the city in twain by decreeing that the right of way is, in contemplation of law, a wall without gates or passageways, would be the perpetration of a monstrous wrong. The necessities of the company do not require this."

They were stated thus in this court:

"The Northern Pacific Railroad Company brought a suit against the City of Spokane and others to restrain and enjoin the defendants from laying out and extending a certain street known as 'Mill Street,' over and across the right of way of the complainant's railroad in said city. The bill alleges that by virtue of the act of congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route,' and the several acts amendatory and supplemental thereto, there was granted to the complainant a right of way through the public lands, to the extent of 200 feet in width on each side of its road, wherever it may pass through the public domain, and that there was further granted to the complainant for aid in the construction of its road, among other lands,

section 19, township 25 N., range 43 W., upon which that portion of Mill street in controversy in the suit is situated; that since the construction of the complainant's road, and for more than eight years prior to August 4, 1889, the complainant maintained its freight station building on that portion of its right of way lying north of its track in said section 19, covering the land in controversy, and that on or about said last-named date the freight sheds and freight station buildings were destroyed by fire, but that within a few days thereafter the complainant rebuilt the same, with the knowledge and acquiescence of said city and its officers; that the said city claims to have some right or interest in the ground, and the right to occupy the same as a street, but that the city has no right thereto, and has taken no steps as required by law to authorize its occupation thereof for any purpose, but that the said city, through its council, has declared its intention to summarily tear down and remove said buildings, and to open the said Mill street across the complainant's premises. The defendants answered, in substance, that the complainant had dedicated said strip of land to the public as a street on the 20th day of January, 1881, and that the public had continuously used the same from that time. \* \* \*

Commenting upon the evidence, this court said further:

"The evidence is that about the year 1880 or 1881, after the town of Spokane had been laid out and platted by the original townsite proprietors, the railroad company laid out what is known as "Railroad Addition," adjacent to the original town, and, by agreement



with the original townsite proprietors, made the streets of the addition conform to those of the original town, continuing the streets and the names thereof through the addition and across the right of way, and thereupon filed a plat of the addition, upon which its right of way was designated as 'Railroad Street,' and certain streets were platted as crossing the same, among which was Mill street. There is no indication upon the plat that it was the intention of the railroad company to close Mill street where the same crosses Railroad street, but, on the contrary, the lines of the plat show Mill street to be open across Railroad street. In the words of dedication which accompany the plat, however, the railroad company used the following language:

"The streets shown upon said plat are dedicated to the use of the public until vacated, except that strip of land, 225.7 feet in width, designated as 'Railroad Street,' which is reserved for the tracks and uses of said railroad company.'

"It is contended that the words of reservation concerning Railroad street operate to except from the dedication all the land contained within the north and south lines of that street, and to cut in twain the streets which upon the plat are indicated as crossing the same. It is obvious that the plat and the words of dedication are to be construed together in arriving at the intention of the dedicator. With this rule of construction in view, it is clear that Railroad street is reserved from dedication to public use, so far as it is necessary to be retained for the tracks and uses of said railroad company, but that at the same time, and coexistent with the reservation, the company has granted by its dedication to

the public the easement to cross its tracks and right of way at certain fixed and designated points; namely, at the streets which are marked as crossing the same. If it had been the intention of the company to withhold from the public the right to cross its Railroad street by the streets which intersect it at right angles, that intention could have been readily expressed, either in words or by lines drawn in the plat to close the cross streets at their point of intersection with the lines of Railroad street. The action of the company from the time of laying out Railroad addition is in harmony with this interpretation of the dedication. The evidence is, that the cross streets, including Mill street, Post street, Howard street, and others, were used by the public from the time the plat and dedication were filed; that the railroad company expressly admitted the rights of the public in Post street where it crosses Railroad Street, by removing therefrom, at the demand of the city, a building then in course of construction, which encroached upon the lines of the street."

These several opinions show in such fashion that the fact cannot be gainsaid that it was alleged upon the one side and admitted by the other in that litigation that Railroad Street was the private right of way of the Northern Pacific Railroad Company, and that the case turned wholly upon the question of whether the railroad company had power to dedicate Mill street across the right of way, and if it had such power, whether it had done so. Here is a practical

construction of the effect of the platting of Railroad Addition of convincing force. The litigation arose when all the facts connected with the platting of Railroad Addition and the understanding of the railroad company and of the citizens of Spokane with respect to the character of Railroad Street, whether it was indeed a public highway, or the private right of way of the railroad company, were freshest in the minds of everyone. The railroad company was not only asserting its right to put a permanent building in the center of Railroad Street on the ground that Railroad Street was its private right of way, but it was denying, upon the same ground, the right of the public to even cross Railroad Street upon one of the intersecting streets. The litigation was one which was bound to arouse great interest, as a controversy between a municipality and a railroad company over the blocking of a street by a railroad company always does. Furthermore, the testimony of Johnson concerning the protest which was made by a number of citizens in 1882 against building a freight warehouse across Post street, and the testimony of Gandy as to the objections which were made to the building of the warehouse across Mill street, which caused the litigation under

discussion, show that the people of Spokane generally were interested in the litigation and observing its course. Also, the senior counsel for complainants in this case was the senior counsel for the City of Spokane in that case. He came to Spokane in 1884, as his testimony in this case shows, and he says that when he came and for several years after, until the time of the fire at least, Railroad Street was much used for public travel; a street, he considered it. Now in 1892 the platting of Railroad Addition was as effective as a dedication of Railroad Street to highway uses as it is today. In 1892, also, if complainants' counsel are now sound in their views, Railroad Street had become a highway by user irrespective of any question of statutory dedication. Why were the points now so strenuously insisted upon not suggested then? Everything had then been done which could be done to make of Railroad Street a public highway. The use of the street by the public, whatever its character, was fresh in the minds of the city's counsel and of the people of Spokane who were urging on the litigation. Can it be that time was required to sharpen the observation of these pioneer citizens of Spokane so that they can see clearly through the mist of years that concerning the nature of the public use of



Railroad Street and its consequent devotion to public highway purposes which was not apparent at the time? Can it be, also, that time was required to ripen the faculties of the distinguished gentleman who appeared for the city in that litigation and for the complainants here so that legal points which were then not discernible now stand forth the palpable truths he asserts them to be? Some such explanation must be found, else it must be said that that litigation, standing alone, is conclusive against the claim now made. In that litigation, both parties assumed that Railroad Street was the private right of way of the railroad company, and the sole question presented in that case by pleadings and evidence was whether Mill street had been opened across it. If at that time it had even been supposed by anyone that Railroad Street was itself a street, that would have been made the prime question in the case, for if it was a street, all the wrangle over the effect of the dedication of Mill street would have been idle.

In our discussion of the Mill street litigation and of the position taken by the city's counsel in that case, we have been guided entirely by what appears in the several opinions in which the issues were stated. The opinions rendered

in that litigation seem to indicate clearly that the City of Spokane did not contend that Railroad Street was a public street, for if such a contention had been made, we assume that the lower court or this court would have noticed it somewhere in their opinions, and if it had been urged would not have made the case to turn upon the question of whether Mill street was dedicated across Railroad Street. If reference to the briefs in this court should show that the point was urged upon the courts, then we tender our most profound apologies to Judge Turner for having suggested that he was not, in 1892, gifted with the same clairvoyance for legal points that he possessed in 1913. He will have to take whatever of comfort there may be in such apologies, however, with the knowledge that if the question was raised in that litigation, then it has passed into the realm of *res adjudicata*, for the decisions therein are clearly inconsistent with the right to claim that Railroad Street is a public highway.

It is worthy of remark, too, that the ripening of the faculties of complainants' senior counsel to the point where he perceived Railroad Street to be a public highway has been a slow matter. As late as 1908, five years before the present action was brought, a circular was sent out pro-

testing against the plan of grade separation with respect to the Northern Pacific tracks, which was then proposed. Judge Turner thinks he wrote this circular. He certainly signed it. In that circular it was said:

“The only possible argument in favor of granting the right demanded by the railroads is the danger from maintaining the tracks of the Northern Pacific Railway in their present conditions. But that condition cannot long be maintained. It is onerous and expensive to the railroads and if the people of Spokane do not weakly yield to the present project of dismembering and disfiguring the city and rendering a great part of it uninhabitable, it will not be long before the Northern Pacific Company will itself devise another way of getting through the city and of utilizing its very valuable right of way property for some other and more desirable purpose.”

It is clearly apparent from the language used that Judge Turner no more supposed in 1908 than he did in 1892 that Railroad Street was a public highway, but considered it on both such periods to be the private right of way of the Northern Pacific Railway Company.

The gentleman, however, is not singular in that respect, but finds himself all the way through in the very excellent company of the City of Spokane. It is not pretended that the City of

Spokane ever assumed jurisdiction over Railroad Street as a street, or attempted to improve and make use of it as a street. It is not claimed that the City of Spokane ever questioned the right of the Northern Pacific Railway Company to put tracks in the street whenever and wherever it pleased, and to make all desired uses of it for railroad purposes, or to put permanent buildings in it wherever it pleased so long as it did not obstruct the intersecting streets. The euphemistic "encroachments" of complainants' counsel have gone on unprotested against until 100 feet of Railroad Street throughout its whole length has been solidly built up with substantial brick buildings. As time went on and the city grew, the intersecting streets were first graded and then paved. For all such purposes, local assessment districts were formed, embracing the property abutting upon such intersecting streets which would be benefited by the improvement, and always, in such case, Railroad Street, at the points where it abutted upon the intersecting streets on either side, was included within the assessment district as the private right of way of the company, and was assessed for the cost of the improvements, the railroad company paying such assessments as required by the city (Record



344, 346). Furthermore, Railroad Street through the city was included by the company in its tax returns as the private right of way of the company, taxes were assessed against it for general purpose, and taxes were paid thereon by the railroad company. *Idem*.

Then there is the final action which appears here of the City of Spokane ordering a grade separation, to be effected by the construction of a solid embankment occupying substantially all that is now left of Railroad Street and extending through its entire length. If Railroad Street is indeed a public highway, the ordering of a use of it which would totally destroy it for highway purposes, was a wholly unwarranted usurpation of power and one of which the city council could not have been ignorant in view of the decision of the Supreme Court in *State ex rel Schade Brewing Company v. Superior Court*, 62 Wash., 96. The *Schade* case was decided on February 4, 1911, and involved the action of the city council of Spokane. The ordinance in question was passed on February 16, 1912, so it was passed in full view of the *Schade* case, and the action of the council can only be sustained on the theory that the city did not believe that Railroad Street is a public highway.

Turning now to the legal phase of the question under discussion.

First we say the user of Railroad Street by the public was not for such a length of time as under the circumstances would establish it a public highway. The use did not commence earlier than 1881, for no one claims there was any travel along Railroad Street any more than there was over any other vacant space in the village of Spokane Falls until people began to go along it in order to reach the depot building. Use of it in a way which at all resembles use for highway purposes ceased with the fire of August 4, 1889. It is not pretended that after that time the strip was used in any fashion which smacked of street use by the public. The witnesses say that directly after the fire railroad tracks were put down in all directions and the railroad company used it for the storage of cars and the loading and unloading of cars all through the addition. Almost immediately after the fire, also, the warehouses which now occupy so much of the street began to be constructed along it.

“Since the fire the strip of land where that driveway was has been leased for railroad warehouses. A good portion of it is now covered by warehouses. It has been so occupied by railroad warehouses since the time imme-

diately after the fire. This driveway has ever since 1889 or 1890 been entirely covered by warehouses. And the same thing is true all the way from Washington street west to Adams." (Gandy, 229).

Also Gandy says:

"Up to the time of the fire there was never any interruption of the use of Railroad Street by the railroad company that I remember of" (225).

Without occupying space with quotations from the testimony of all the witnesses, it is sufficient that they all fix the time of the fire as the period up to which there had been use of Railroad Street for highway purposes. Complainants' counsel, indeed, substantially admit that the period of use as for highway purposes must be limited to end with the fire in 1889. They could scarcely admit less, so unequivocal were the acts of the railroad company in denial of the right to use Railroad Street for highway purposes from that time.

§5657, 2 Remington & Ballinger's Code reads as follows:

"All public roads and highways in this state that have been used as such for a period of not less than seven years, and are now so used, where the same have been worked and kept up at the expense of the public, are hereby declared to be lawful roads and highways within the meaning and intent of the

laws now existing governing public roads and highways in this state.”

This act has no application save when the land in controversy has been worked and kept up at public expense.

*State v. Seattle*, 57 Wash., 616.

There is no claim that the public authorities ever did any work on Railroad Street, or that public money was ever expended on it.

A public highway may, of course, be acquired by prescription, though no public work has been done or public money expended upon it. But in such case the period of use must be the same as the period of limitation for quieting title to land.

“But this statute does not apply to roads which have been used adversely for a period of time sufficient to constitute a road by prescription without public expense thereon. It applies to cases only where public work and money have been expended. In such cases seven years’ user is made sufficient. In other cases the prescriptive period is co-extensive with the period of limitation for quieting title to the lands. *Wasmund v. Harm*, *supra*. The purpose of this statute was evidently to lessen the prescriptive period, when public work and money had been expended. It does not affect the rule in cases where no public work has been done.”

*Seattle v. Smithers*, 37 Wash., 123, 124.



That period is ten years under §156, 1 Remington & Ballinger's Code, which reads as follows:

“The period prescribed in the preceding section for the commencement of actions shall be as follows:

Within ten years—

1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action.”

It was squarely held in *Petterson v. Waske*, 45 Wash., 307, that the period necessary to establish a highway by mere adverse use was ten years.

It follows there was no use here for such a length of time as would fix Railroad Street as a public highway. No doubt portions of Railroad Street were occasionally used in limited fashion as a passage way after 1889. Travel of some sort is never entirely suspended, even through railroad yards, for members of the public will occasionally have business there or find it convenient to pass through. The vital factor in the situation, however, is that the acts of undeniable hostility to public use which marked the conduct of the railroad company from 1889 on, affected

the whole strip, such acts not being confined to any portion of the strip, but extending over the whole thereof.

Quite apart from the question of time of use, however, the authorities make it perfectly clear that the use here, considered in the light of all the circumstances which mark its character, was not sufficient to fix upon Railroad Street the character of a public highway. The use by the public of that strip of land was plainly permissive, and was plainly understood by the public to be so, for as the railroad company from time to time took possession of the portions of the strip for which it had theretofore had no use, and when it built almost half the strip up solidly with substantial buildings, no objection was made by the public. These things, taken in connection with the special assessments levied against the land in the strip for the purpose of paying the cost of improving the streets running across it, and the levy of general taxes thereon, clearly mark the use as being of the purely permissive character which has never been held sufficient to establish the existence of a street.

In *Dahlstrom v. Anderson*, 56 Wash., 575, it was sought to establish a highway both by statutory establishment and by adverse user. Hold-

ing the evidence insufficient to establish either, the court said, in commenting upon the evidence:

“When travel first began along the route over which the road was attempted to be established, the country was open and remained so in its greater part for a considerable period of time. During this period the travel seems to have followed substantially one general way; but as the country gradually settled up, changes were made in it to suit the convenience of the settlers, seemingly without regard to the claim that the public had a right to a particular way. This change was so complete that at the time of the trial no part of the original way, unless the particular strip in question here be an exception, remained in existence as a way. Indeed, it was shown that many of the buildings, and among them the city hall of the city of Ballard, were erected on the line of the road as it was shown on some of the earlier maps, and that a public school building of the same city was erected in what was once the traveled way. Then again, the entire way through this particular block had not been opened for a number of years. It was shown that former owners of that part of block 49 lying immediately west of the tract here in question closed it for travel to the public at its western extremity several years prior to the trial, without protest from any of the public authorities, and that they left that part of it open which is now the property of the respondent for their own convenience, permitting such use of it as was made by the public through sufferance rather than as a matter of right. Moreover, there has been no demand for this particular tract as a public way for many years. The surrounding country has long been

platted into lots and blocks, with streets and cross-streets open to public use, and these streets now furnish, and have long furnished, all necessary ways for the public at large. The foregoing facts seem to us to argue conclusively against the claim of a public way, and as the appellants do not contend that they have individually a right of way over it, we think the judgment should stand affirmed, and it will be so ordered."

The pertinency of this decision to the facts in the case at bar scarcely needs be pointed out. The evidence of the complainants' own witnesses establishes that during the period in which they attempt to show a public use, the travel along Railroad Street was induced solely by the fact that it was a smooth, level piece of ground, while the surrounding land was unfitted for travel because of its roughness and rockiness, and that all during that period the people of the village traveled as they pleased over any vacant ground, and that if there was more travel over Railroad Street than over any other vacant ground there, it was solely because of the character of the land in it. The evidence shows too that the travel was in no way restricted by the street lines, but went as much upon the land which was platted into lots and blocks abutting thereupon as on the marked street space. Neither was there any definite and certain roadway, but people went



wherever convenience dictated. There were present very early the elements of obstruction, of final complete blocking, and of no necessity, which are remarked upon by the Supreme Court of the state in the case just above cited.

In *Forster v. Raznik*, 46 Wash., 692, the court held the existence of an alley was not established under the following evidence:

“It appears that this strip of land was, by the makers of the plat of one of these additions, some years after the filing of said plat, conveyed, or attempted to be conveyed, to Frank H. Graves, by warranty deed, in October, 1885, and after various mesne conveyances, a deed thereof was made by one of his successors in interest, to the respondents Raznik. The ground appears never to have been used at any time as an alley. In 1887 the city council of Spokane adopted a resolution reciting that, whereas there was some controversy concerning the matter, they were of the opinion that the city had no vested right in said ground, and thereby disclaimed all rights to the same as a public alley or highway. Subsequently the city appears to have assumed a different attitude, although it did not open or use the strip as an alley. It has been assessed annually, with possibly one or two exception, since 1885, by or for the city, and the taxes were always paid. Special assessments were also levied against it by the city for the improvement of Riverside avenue, Bernard street, and Sprague avenue, some of these having the effect of lessing the amount assessed upon appellants’ property abutting thereupon. A building was erected thereon in

1887, and a permanent building in 1897. The defendants Raznik and their predecessors appear to have been, for more than twenty years last past, in the actual, open, and notorious possession, under color of title and claim of ownership. Neither appellants nor their ancestors are shown to have objected to this possession, or to have made any protest against the improvement or occupation of said strip of land by said defendants and their grantors. There was evidence that, when these defendants constructed the permanent building referred to, the west wall thereof was connected with the east wall of a building owned by these appellants or their predecessor in interest, by consent."

Travel over a strip of land which appears to have been permissive in character, and which, upon claim being made that the strip was a highway, was disputed by the owner of the land through the erection of obstructions, etc., thereon is insufficient to establish a highway by adverse use.

*Stohlton v. Kitsap County*, 49 Wash., 305.

*Megrath v. Nickerson*, 24 Wash., 235.

Where vacant unenclosed land was traveled over by people at will, and such use was made of it generally as is usually made of unenclosed property by people who reside near it, and where the travel had no fixed or definite track, there is no establishment of a roadway by prescription. So holding, the court said:

“The character of the use necessary to establish a highway by user has been often before this court. We have held that the use to be sufficient for that purpose must be an actual, uninterrupted, continuous use by the general public under a claim of right for a period of ten years; that it must be adverse to the owner of the property, and while such owner is without disability in law to assert and enforce his rights; and that use by license or permission of the owner, or while he is under disability, is not such a use as will create a public easement.”

*Petterson v. Waske*, 45 Wash., 307.

The board of county commissioners obtained from the owner of lands a temporary dedication or grant of a right of way across it for the use as a county road. The road was used for about eighteen years in all by persons desiring to travel over it. The county at different times refused to expend public money on the strip in controversy, either because it had no right of way, or because it was in dispute. The owner paid taxes on the land embraced in the right of way and at different times maintained gates across it to exclude stock. It was held there was no highway.

*Scheller v. Pierce County*, 55 Wash., 298.

Turning from state cases which were cited first for the reason that they are controlling upon this question so far as their facts are analogous, we

find in the decisions of other states facts more nearly analogous to those here present. The cases are too numerous and the facts in each of them are stated too much in detail to permit comment upon them individually. We select the case of *International, etc., Co. v. Cuneo*, 108 S. W., 714, as illustrative of them all, not only because the facts stated in the opinion tend much more strongly to establish the dedication of a street than do the facts appearing here, but also because in the opinion the rules are well stated which govern in determining whether there has been a dedication. We quote the material portion of the opinion, but must ask the court to read the original report to obtain the facts.

“In order to constitute a dedication, it is essential, ‘first, that there be an intention upon the part of the proprietor of the land to dedicate the same to public use; second, that there be an acceptance thereof by the public; and, third, that the proof of these facts be clear and satisfactory. The vital and controlling principle is the *animus donandi*, and whenever this is plainly manifested on the part of the owner of the soil, either by formal declaration or by acts from which it may fairly be presumed, such as should equitably estop him from denying such an intention, the dedication, so far as the owner is concerned, is complete. Without such manifestation of intention by either of said modes it cannot be said that a valid dedication is possible. To make a sufficient dedication



the proprietor of the soil must devote the portion thereof intended for public use to such use, and, on the part of the public, it must be accepted and appropriated to that use. The acts on the part of the donor and the public of an intention to dedicate, accept, and appropriate the lands to public use, where the dedication is relied upon to support some right, must be clear. A dedication is not an act of omission to assert a right, but is the affirmative act of the donor, resulting from an active, and not a passive condition of the owner's mind on the subject. A mere nonassertion of right does not establish a dedication, unless the circumstances establish a purpose or intention to donate the use to the public."

Other cases fully sustaining the case referred to on facts more or less like those in the case at bar are:

*Williams v. Ry. Co.*, 39 Conn., 509.

*Wilson v. Land Co.*, 39 So., 303.

*Loomis v. Lighting Co.*, 61 At., 539.

*Georgia, etc., Co. v. Atlanta*, 45 S. W., 256.

*Cincinnati, etc., Co. v. Roseville*, 81 N. E., 178.

*Bacon v. Ry. Co.*, 76 Atl., 128.

*New York, etc., Co. v. Ossining*, 126 N. Y. Supp., 517.

*New York, etc., Co. v. Ryan*, 129 N. Y. Supp., 55.

*Baltimore, etc., Co. v. Seymour*, 55 N. E., 953.

*Chicago v. Ry. Co.* (Ill.), 38 N. E., 768.

*White v. Bradley*, 66 Maine, 254.

*Frankford, etc., Co. v. Philadelphia* (Pa.),  
34 At., 577.

*Sioux City v. Ry. Co.*, 106 N. W., 183.

It is said in complainants' brief:

"If 'the use of this strip of land from 1881 to 1889 was but natural under the circumstances,' as found by the learned judge below, then the head notes to *Hogue v. City of Albina*, 10 L. R. A., 673, quoted in the opinion, was quite sufficient to sustain his decision that that use was wholly insufficient to constitute a common law dedication. But if that use was in the highest degree unnatural, except on the theory that the strip of land was intended to be devoted to public use as a street, then the principles to which complainants appeal must prevail, and there was a common law dedication."

We are quite willing that our case on this point be tested by the touchstone there proposed. Wherein was there anything "in the highest degree unnatural" in the use of the tract in question during the '80s, as that use is shown by the evidence? Wherein is there inconsistency between such use and the intention of the Railroad Company to devote the street wholly to railroad purposes as its needs should require? The tract was smooth, level gravelly. The land lying

around it was rough, broken, rocky. The Railroad Company needed to use but an insignificant part of the tract. The remainder lay vacant and unused, just as did all the land surrounding it. Whenever the Railroad Company found need to use additional portions of the tract, it did so, and no one disputed its right in that behalf. How unnatural it would have been for the Railroad Company to have denied the public the right to go along and across this vacant strip as their convenience might require, just as they did upon any of the other vacant land lying round about, when such use of it by the public in no manner trenched upon the railroad use! What an act of unreasonable arbitrariness, prompted by nothing but mere wish to annoy and vex, it would have seemed if the Railroad Company had in those early days fenced up this vacant strip, or in any other way denied the right of the public to go upon it! To so act would not only have been unnecessarily vexatious to the people of the town, but it would have been contrary to the best interests of the company. The business part of the town the testimony shows to have been along Howard street, which was three blocks east from the depot building, two or three blocks north from Railroad Street.

Because of the broken, rocky character of the ground lying directly between the depot building and the business district, travel by wheeled vehicles could only go, and by other means of locomotion could most easily go, by way of Howard street to the level railway track, and thence west to the depot. Furthermore, it was convenient for the company, the evidence shows, to leave cars standing upon the sidings into which and from which the freight could be loaded and unloaded without the necessity of warehousing. Instead of the use which was permitted of Railroad Street being in any way unnatural in view of its ownership by the Railroad Company, it was in the highest degree natural in that connection.

But while on the subject of naturalness and unnaturalness, what shall be said of the use which was made of the strip by the Railroad Company if it be supposed that the Railroad Company intended to dedicate and the public intended to accept the strip as a public highway? With the so-called dedication of the street went the placing of a permanent building in it. In 1882 another permanent building was placed upon it. All along, as railroad needs required, additional tracks were placed where the Railroad Company



pleased. A citizen of the community was forbidden to take his wagon to a particular place in it for the purpose of loading it. Cars were placed on the sidings for loading and unloading and left there at pleasure, and portions of the strip otherwise unoccupied were used for storage purposes as the Railroad Company pleased. Finally the Railroad Company assumed the right to lease to individuals space for wholesale and ware houses upon it, and this has proceeded to the point where half of the platted street has been solidly occupied by such houses. Is there not in this a considerable degree of unnaturalness if it is supposed that the strip was intended to be or became a street? Truly we think that complainants' counsel have proposed a test which must destroy their case.

## V.

### *Other Points.*

We have no doubt of the soundness of complainants' fifth position, *viz.*, that if the strip of land in controversy is a street, the separation of grades may not be accomplished as the City of Spokane has ordered. The Supreme Court of the state has said in most unmistakable fashion that it is beyond the power of a municipi-

pality to permit or require any use of a street, or alteration in its surface, which is incompatible with its use for street travel. The right of a railroad company to use the street and the interests of public safety where a railroad is laid in or across a street, must yield to the paramount necessity that street travel along the street be not interfered with. It is such holdings of the Supreme Court, indeed, which mark impossible the joint occupation of Railroad Street by the public for purposes of public travel and by the Northern Pacific Railroad Company for railroad purposes, and which, by so marking, put beyond peradventure that the Northern Pacific Railroad Company had no power to dedicate its right of way to street uses.

As to the sixth point, that the City of Spokane was not a necessary party to this action, while we think the contrary it seems needless to argue the question at length here. Had a decree been rendered in complainants' favor, it would then have been necessary for the court, we consider, to have required the City of Spokane to be brought in so that in the one decree the rights of all parties in Railroad Street and in the intersecting streets might have been settled. It will be time enough when the courts have determined

that Railroad Street is a public street to determine what parties are necessary to a decree which shall finally fix the rights of all who will be affected by such a decree. Should that time ever come, we think there can be no question but that it will be necessary to bring in the City of Spokane, for it, beyond any other individual or corporation, is entitled to be heard as to what it may think necessary or proper with respect to its streets.

Respectfully submitted,

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E. J. CANNON,  
GRAVES, KIZER & GRAVES,  
Solicitors for Appellee.





# UNITED STATES CIRCUIT COURT OF APPEALS

## For the Ninth Circuit

H. A. & L. D. HOLLAND COMPANY, a  
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Appellant,

vs.

NORTHERN PACIFIC RAILWAY COM-  
PANY, a Corporation,

Appellee.

GEORGE TURNER and BERTHA TUR-  
NER, Husband and Wife,

Appellants,

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No.

2332

### REPLY BRIEF OF APPELLANTS.

Upon appeals from the United States District Court for the  
Eastern District of Washington, Northern Division.

**FILED**

FEB 9 - 1914

TURNER & GERAGHTY,  
POST, AVERY & HIGGINS,  
Solicitors for Appellants.

*Spokane, Washington.*



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NORTHERN PACIFIC RAILWAY COM-  
PANY, a Corporation,

Appellee.

No.

2332

### REPLY BRIEF OF APPELLANTS.

#### FIRST

*Was Railroad Street, in Fact, Carved Out of the Right  
of Way of the Railroad Company?*

The argument of respondent on the above ques-  
tion is amusing if nothing more. Light and airy  
persiflage may be resorted to, no doubt, in a legal

brief, to puncture an argumentative bubble; but when the bubble has been thus pricked and burst, what is the use of bringing a ten-inch rifled cannon to bear on the wet spot and bombarding it with shot and shell? That is what our friends of the other side have done, metaphorically speaking, in the twenty-seven pages of their brief, devoted to our first proposition, and in doing so they have betrayed an uneasy consciousness that, after all, their shafts of satire have glanced off the despised bubble, leaving it still intact, and a serious obstacle in their path to the ravishment and dismemberment of a beautiful city, and incidentally, to the destruction of valuable private rights.

Let us now look at some of the missiles fired at the supposed bubble, for the purpose of determining whether they are the solid steel shot they purport to be, or mere rotten imitations that shatter with the impact of the powder behind them.

Speaking of the doctrine of merger, counsel for respondent say: "The corner stone of their argument, that the right of way title, passing under the right of way grant, is inferior to the title to the aid lands, passing under the aid grant, is palpably unsound. The right of way title is the prime, the superior title, and if under such conditions as are here present, there is a merging of an inferior in a superior title, the title under the aid grant merges in the title under the right of way grant to the whole right of way." Then, after citing a number of Federal cases to



support its contention, which do not in fact support it, respondent proceeds: "When title vests under the aid grant it is absolute and the grantee may dispose of the granted land as it chooses. The title which vests under the right of way grant is not absolute, and the grantee must retain the granted land for railroad purposes, and may not dispose of it or encumber it without the consent of congress."

The ordinary mind, to which counsel is fond of appealing, will find some difficulty in reconciling these two statements, because to an ordinary mind having some knowledge of the sense in which the terms are used in the law relating to merger, it will at once appear that a legal title that is absolute is superior to one that is not absolute.

Passing then to a consideration of the matter on principle, counsel find an insuperable obstacle to merger in the fact, as claimed, that each of the grants was "independent of and dissociated from the other, as though between two private parties separate tracts of land had been conveyed."

This position betrays a carelessness of fact and a confusion of ideas which we had not expected from our learned friends. It is not true, in the first place, that the grants were independent and dissociated from each other. They were made at the same time and in the same instrument and to effectuate the same end. But if they had been independent and dissociated

grants, we have yet to learn that that would present any obstacle to merger. Indeed it is with reference to that class of grants that merger is most generally declared. Nor is it accurate to assume, as counsel do, that the grants related to separate tracts of land. If they did so relate, then, of course, there could be no merger, because it is impossible to conceive of any situation growing out of grants of separate tracts of land where an inferior and superior title would coincide in the same individual as the result of such grants. The grants here, however, had relation in part to the same tracts of land, that is to say, to all odd sections of public land through which the line of railway might be constructed, and as to which, if not sold, reserved or otherwise disposed of, or pre-empted or homesteaded, at the date of definite location, both the right of way grant and the aid grant would attach.

We next notice the contention that "the right of way grant is of the particular, the aid grant of the general. The first conveys title to a certain definitely ascertained strip of land across the public domain upon which the railroad is or is to be constructed. The second is dependent for its operation on the first," etc.

That anything has ever been said by any court to justify a contention so extraordinary, we respectfully deny. The distinction between the two grants, that the one was without condition and the other conditioned that the lands had not been disposed of at the time of the filing the map of definite location, is well

known to all lawyers, but that the right of way grant was of a "definitely ascertained strip of land across the public domain" is a preposterous statement. Until the filing the map of definite location it was a float and might have been located anywhere along the general route, and was no more definite than the land grant, which equally with the right of way, attained precision by the filing the map of definite location.

We concede that if some one had settled on section 19 prior to the filing the map of definite location, he would have taken his rights thus acquired subject to the right of way of the railroad company. It is not our contention that the right of way grant was confined to even sections. It contemplated that private rights might attach to odd sections that would otherwise come to the railroad company under the aid grant, and therefore was written in general terms so as to cover all sections of the public domain, odd and even, over which the line of railway might be constructed. No settler could intervene and cut it out. But when that had occurred which prevented the intervention of settlement or adverse rights, what the legal status of the title was would be dependent, first, on the principles of law applicable to such a double grant, and, second, on the presence or absence of a policy underlying the grants, which might control and modify their legal effect. Both of these considerations were discussed in our principal brief, and we need not advert to them further.

We next notice the position of respondent that the "aid grant is a bonus given as an inducement for the acceptance and use of the right of way," and say that that fact, if true, would not militate against the operation of the law of merger as claimed by us. But the distinction thus taken between the two grants does not appear to be sound. Both were aid grants and neither was a consideration for the other.

*Railroad Co. v. Baldwin*, 103 U. S. 430.

Passing now to the argument in respondent's brief made, as claimed, from the standpoint of reasonableness, we find it based on deductions drawn from the decisions in the *Smith* and *Townsend* cases that "by granting a right of way four hundred feet in width, congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." It is to be noted that those decisions were made as against individuals striving to maintain a status in the right of way under statutes of limitation or by virtue of the doctrine of estoppel. Manifestly, in such cases, the determination of congress was binding on the courts, and there was no room for any other declaration. But to deduce from those decisions some grave, well defined general policy of congress in the direction of an extraordinarily wide right of way is to expand them beyond anything intended by the courts and to fly in the face of the fact that congress consented to any right of way not less than fifty feet in width, where the right of way was purchased from private persons or acquired



by condemnation proceedings. If congress had contemplated the necessity of a four hundred foot right of way, as an aid to national policy, it would have required it throughout and from end to end. Now all that can be said, in view of the decisions in the Smith and Townsend cases is, that as to lands coming to the railroad company under the right of way grant, the right of way, as against private persons, must be maintained of the width of four hundred feet. Respondent attempts to deduce the further consequence, that a four hundred foot right of way throughout was a national policy, which policy must have its effect in determining whether a particular parcel of land came to the company under the right of way grant or under the aid grant. To our minds, which are ordinary in the ordinary sense, and not in the extraordinary sense of the minds of counsel for respondent, the added deductions are a little strained and not fairly to be maintained from the standpoint of mere reasonableness.

When counsel for respondent come to consider the propositions of complainants that the aid grant was the first to attach, and that it was not displaced by the right of way grant when the road was finally constructed, they are more than ordinarily facetious. The ordinary mind is again nonplussed at the intellectual feat which can find priority for the aid grant when "the aid grant is fixed with reference to the route of said line of railway." This is called raising a stream higher than its source. And again it is said that the

ordinary mind cannot comprehend "how that which is without precision, definiteness or certainty, a 'float' which may settle anywhere or merely continue to float, can be the measure for and de-limit that which is precise, definite and certain."

We must, in compliment to counsel, attribute these brilliant flashes of wit to a willful misunderstanding of our position and of the legal principles involved, since any other view would derogate from that intellectual superiority which they assume and which we know they possess. Counsel, after their exhaustive review of the cases relating to aid grants, must have been aware that the aid grant was not fixed with reference to the "route of the line of railway." It was fixed with reference to the line laid down on the map of definite location, which may or may not coincide with the "route" actually followed. Why the limits and the accruing of the land grant were made to depend on that record act, rather than on the actual route of the road, is told by Mr. Justice Brewer in *Tarpey v. Madsen*, 178 U. S. 226, a case which counsel have cited in their brief. Now how that record, on file in the archives of the nation, can be properly termed "a float which may settle anywhere or merely continue to float" we confess our inability to understand, and must, as counsel for respondents have so frequently done, take refuge behind the limitations of an ordinary mind.

With reason tottering as the result of our assaults upon it, counsel for respondent next turn to what they call our onslaught on authority. We said in our brief that the line of definite location laid down on the map was only approximate and might be departed from in the actual construction of the road and that only the government could complain, and as a deduction we argued that since the map of definite location did not actually fix the line upon which the road was to be built, but did fix it for the purposes of the accruing of the title to the granted lands, that as to odd sections coming to the company under the land grant, the land grant title was the first to attach, and left nothing for the right of way grant to attach to when the road was finally constructed. It is the premise to this argument that respondent denounces as an assault on authority. We were speaking, of course, with respect to a change of location which did not trench on private right, and which involved at the time it was made only the railroad company and the government. If the premise be correct the deduction drawn from it appear to us to be sound, provided of course, and always, as conceded in our main brief, that no policy be found in the granting act to which such a line of reasoning would run counter. As full and perfect authority for the premise, we have presented, among other authorities, and do now present, the case of *N. P. R. Co. v. Smith*, 171 U. S. 260. In that case the railroad company had made and filed its map of definite location, and several years thereafter when it constructed its road it departed from the line

of its map and constructed over an even section two miles north of the line of definite location. The court held the title to the right of way thus acquired superior to that of private individuals claiming under a townsite location initiated but not perfected before the actual building of the road, saying:

“But suppose it be conceded, for the sake of the argument, that the Lake Superior and Puget Sound Land Company made the first entry, and that the city of Bismarck and Smith its grantee could avail themselves of such entry, still the proof is that the railroad completed its road over the land before the townsite was patented, and before Smith obtained his conveyance. To acquire the benefit tendered by the Act of 1864 nothing more was necessary than for the road to be constructed. The railroad company by accepting the offer of the government obtained a grant of the right of way, which was at least perfectly good as against the government.”

The position thus definitely stated, is the necessary corollary of many other decisions by the same court, some of which we have cited, and is inferentially sustained by one of the cases upon which respondent relies with so much confidence to establish a contrary doctrine, namely, *Missouri etc. Co. v. Cook*, 163 U. S. 491. That case merely held that the beneficial easement of the right of way grant acquires precision and becomes fixed in favor of individuals acquiring title to the public domain upon the filing of the map of definite location—that is to say, that as to such individuals, if the railroad wants to make a second location, it must do so subject to prior rights acquired by them.



The reservation at the end of the opinion shows that the court had in mind the question of the right of the railroad company as between itself and the government, to change its location, and intended to guard its opinion against a construction adverse to the railroad company on that question.

As to the case of Northern Pacific Railway Company v. Murray, 87 Federal R. 648, decided by this court, it went no further and decided no question other than that decided by the Supreme Court in Missouri etc. Co. v. Cook. It made no reservation similar to that made in the Cook case, but the *ratio decidendi* must be looked at in the light of the case actually before the court.

The concluding part of respondent's argument on our first proposition is a melange in which misconception of the nature of the doctrine of merger and of the relation of legal titles to each other necessary to call it into play, is mingled with caustic comment on the elementary character of the learning cited by us in support of our position. This melange induces two reflections which we throw out for what they are worth. One is that it would be well for our friends on the other side to give more attention than they have given, or are apparently disposed to give, to the elementary works. The other is that it is better to go to the horn books for horn book law, than to clutter up the pages of a legal brief with an undigested mass of hit or miss authorities collected from digests and text books.

We believe that our contentions on the question at issue, though vigorously and speciously assailed, have not been overturned by the argument of respondent. We restate them briefly:

FIRST: The title under the aid grant was the first to attain precision, and is therefore the title to be considered in determining the validity of the dedication of Railroad Street.

SECOND: If both the aid grant and the right of way grant attained precision at the same time, the latter was an inferior title and became merged in the superior title conferred by the grant in aid.

THIRD: There is and was no national policy, evidenced by the granting act, or otherwise, which stands in the way of the first and second contentions if they be well taken in law.

## SECOND

*But If the Railroad Company Took Title Under the  
Right of Way Grant, Did It Have the Power  
to Dedicate a Part of Its Right of Way  
as a Public Street?*

We are indebted to respondent for the insertion in its brief of the statutes of the state relating to the control of municipalities over their streets, and for the

citation of many interesting decisions relating to the same, but neither those statutes nor the decisions thereon, really affect the question of power here under consideration. A new factor appears in the case at bar, and that is the Act of Congress under which the railway company maintains its status in Railroad Street,—that is to say, if Railroad Street was carved out of the railroad right of way.

The opinion of this court in the case of the cross streets when that case was before it twenty years ago, answers every one of the suggestions of counsel as to the untoward results which might ensue if Railroad Street be declared to be a street and subject to the police power of the city of Spokane. This court said in that opinion:

“Of course, the railroad company could confer upon the public no greater estate than it possessed, and, in any view of the case, the dedication could not affect the reserved rights of the United States, whatever they might be. The public easement, so dedicated, is undoubtedly subservient to the exigencies of railroad use, and the public take the dedicated crossing subject to the inconvenience which may result from the increase of traffic and transportation along the line of the road and the possible necessity of laying more tracks thereupon; but the company after such dedication, and after rights have been acquired thereunder, may not close up the street with a building, and may not say, as in this case, that because it is convenient to have a warehouse at this point, and because there is no place in the city so desirable for that purpose, it will revoke

the rights which it has conferred upon the public by the dedication.”

*N. P. R. Co. v. City of Spokane*, 64 Fed. R. 509.

In that case all the direful consequences to ensue from having an established street in the right of way were pressed on the court with as much force as in this case, and all the consequences deduced from the power of the city over a longitudinal street can as well be urged against the establishment and maintenance of a cross street; but the argument did not impress the court then, and it has no more force now than then.

Congress granted the railroad right of way for national purposes and pursuant to ample national power, and therefore the extent to which the use of the right of way may be limited is not wholly dependent on local statutes or local policy, but is to be measured primarily by the national will. We say primarily, because the Supreme Court in the *Townsend* case said that such rights of way were amenable to the police power of the states. We assume, however, that neither under the police power, nor under the power conferred on the city to regulate its streets, if there be any difference between the two, could the state disable the railroad company in the beneficial use of its right of way. It is true that the city has power to vacate all streets within its limits, but if it should undertake to exercise that power with reference to Railroad Street, neither the fee nor the beneficial use would vest in the abutting owners, because that



would be to allow a local law to overcome and destroy a national purpose. In case of such vacation the result would be, we believe, that the rights both of the railway company and the abutting owners would remain precisely the same that they are today, namely, the right to a joint and common use, to be enjoyed by each with due subordination to the rights of the other. Under the municipal law vacation would not destroy the right of the abutting owners to access and light and air unless compensation were made for those rights. Under the Federal law it would not deprive the railroad company of its right of way privileges because having been granted by the nation they could not be taken away by the state.

But as stated by the Supreme Court in the Townsend case, the right of way of the railroad company is amenable to the police power of the state. The pretence made in this case that the railway company is proceeding to raise its tracks on its own right of way under the compulsion of a mandatory ordinance of the city of Spokane, is an admission by respondent of that power and of its extent. If, instead of requiring the raising of its tracks, the city had said to the railway company that it must cease to make the heart of Spokane its switching yard, and must maintain only such tracks there as were necessary for the passage of through trains, it would have been an equally valid exercise of police power. If that had been the order and it had been complied with, Railroad Street on each side of the tracks would now be as available for travel longitudinally as much so as it was during the

first ten years of its establishment, and the awful congestion that respondent has pictured on the right of way as the result of the maintenance of Railroad Street, and the consequent danger to life and property, would be a picture only. Why could not the railroad company contract with the city in advance that it would not introduce such a condition, if having created the condition it may now be required to abate it? And if such a condition arises as the result of the establishment of Railroad Street, because of the incompatibility of the street with the extraordinary use it wants to make of its right of way in the heart of the city, why could it not validly contract against such use by consenting in the beginning to the establishment of Railroad Street? These considerations go far to mitigate the sacro-sanct character of respondent's right of way, and exhibit the emptiness of the long disquisition, based on the awful consequences to ensue from impairing the sacred right of the railroad company and letting the public share therein, with which respondent assails the intelligence of the court to induce its consent to a breach of solemn contract and an act of bad faith.

In speaking of the supposed incompatibility of the street with the right of way, counsel for respondent make this prefervid declaration: "It needs no evidence, it needs no authority, to establish that the one is utterly incompatible with the other. One or the other must give way, for a transcontinental railroad

handling the enormous traffic which the Northern Pacific Railway does, manifestly cannot operate its road in the center of a city street, along which as well as across which the city's street traffic continually flows." Yet the enormous traffic of which counsel speaks is hauled over a single line of track for more than two thousand miles. It is not the enormous traffic hauled by the railway company which embarrasses that company in connection with Railroad Street. It is the fact that it has thus far been successful in the larceny of Railroad Street in order that it might turn it into a switching yard, thus making it a public nuisance which it ought not to be permitted to maintain, street or no street. Of course the respondent must have a switching yard and ample warehouse facilities somewhere in the city or its environs. But those facilities may be provided anywhere along its line, east or west of Railroad Street, without invading the very centre and heart of the city, and setting up a condition which enables it to dilate on the incompatibility of that condition with the maintenance of its solemn obligations. So far as its transcontinental traffic is concerned, as well as its local traffic in Spokane, both may be well and conveniently carried on without the destruction or impairment of the rights of the public in Railroad Street. The contention that there is any incompatibility between the street and the right of way is the sheerest fustian and nonsense.

We next notice the argument of respondent that there is no warrant for the distinction taken in the brief of complainants between a public and private use of the Northern Pacific right of way. It asks, "Where, pray, is there in the Northern Pacific grant any word of discrimination between private right and public right?" We answer, there is none except that which is necessarily implied. That the discrimination is there however by necessary implication, we have on the authority of this court in *N. P. Ry. Co. v. City of Spokane*, and on the authority of the Supreme Court in the *Townsend* case and the *Ely* case. The distinction is not ours as counsel seem to think. It is not only implied by the care with which the courts limit the effect of their decisions to alienations in favor of individuals, but it is expressly declared in all of them. Thus in *N. P. Ry. Co. v. City of Spokane*, it was said:

"Whether the company acquired the fee to the lands covered by its right of way or not, no reason is apparent why it may not dedicate *public* easements over and across the same."

And again: That it

"might not cede to the *public* rights and easements so extensive or of such a nature as to interfere with its duties to regularly and properly operate a railroad."

And in the *Townsend* case it was said:

"Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would



become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

In view of these expressions, counsel are really criticising the courts and not us, when they say: "To say that one act is forbidden and the other not because the right in one case is private and in the other public, is not to deal with the matter sensibly."

Counsel for respondent are alarmed at the consequences that would flow from the maintenance of the dedication of Railroad Street. They see in fancy a highway stretching across Washington from Spokane to Seattle, indeed from the Great Lakes to Puget Sound, laid out on the right of way of their client, and dedicated by it, receiving the benefits of the easy grades, the tunnels through the mountains and the bridges across the large rivers. Well, considering the fact that their client occupies a right of way four hundred feet wide with a single track, between the points named, the suggestion seems rather feasible to us, and does not frighten us in the least. But in view of the trepidation of counsel we feel called on to re-assure them; we have noticed no signs of an enlargement of the heart which might induce their client to become a public benefactor by making the dreaded dedication. As for the further fear expressed that the state or the nation might at some time lay out a high-

way on unused parts of the right of way, we have their assurance in other parts of their brief that that sacred ground is taboo, and beyond the power of the public to condemn for street or highway purposes.

We have no quarrel with the numerous state cases cited and quoted from by respondent in which it was held that cities had no power to condemn parts of railroad rights of way for street purposes. It would be tedious to examine those cases in detail and point out the extent to which each was influenced by considerations that have a bearing on the point under consideration, namely, the limitation imposed by the Act of Congress on the railroad company in dealing with its right of way. It is doubtful if the pleadings in this case can be construed as raising the issue of *ultra vires* generally, but if they can be so construed the decision of Mr. Justice Brewer in the Circuit Court and of the Supreme Court on appeal, in the case of *Union Pacific Railway Co. v. Chicago etc. Ry. Co.*, 47 Federal R. 16, 163 U. S. 564, authoritatively answers all the cases referred to by respondent. Mr. Justice Brewer said in that case: "It (the Railroad Company) may do all the business which is offered, and still have a surplus use of its tracks. Can it be that its obligation to the government or the public compels it to let that surplus lie idle?" And again: "I think it may be laid down as a general proposition that a corporation, which, in the discharge of the duties imposed on it by charter, acquires property which it must have for its own uses, may, if there be a sur-

plus of such property, make a contract for the disposition of such surplus use in any manner not inconsistent with the purposes of its creation." In this connection we again quote a part of Judge Brewer's remarks with respect to the defense of *ultra vires* by corporations: "It is not seemly for a corporation, any more than for an individual, to make a contract and then break it,—to abide by it so long as it is advantageous and repudiate it when it becomes onerous. The courts may well say to such corporation: 'As you have called it a contract we will do the same. As you have enjoyed the benefits, when it was beneficial, you must bear the burdens when it becomes onerous, unless it clearly appears that that which you have assumed to do is clearly beyond your powers.' "

In connection with its *ultra vires* argument, respondent insists that the power of the company to dedicate the street cannot be influenced by conditions as they existed in 1881, at the time of the dedication. That may or may not be true when considering the limitations of the Act of Congress, but it is not true when considering the power of the company under the general doctrine of *ultra vires*. Whether at the time it made its dedication it had a surplus which it might devote to a public use without impairing its ability to perform its charter obligations, is, according to Justice Brewer, the very measure of its corporate power in the matter of the dedication.

Still pursuing its assault on the dedication on the ground that it was *ultra vires*, respondent, having worked out to its own satisfaction that there was no power under the laws of Washington to condemn any part of the right of way for a street, is called on by the necessities of its case to insist that the power to dedicate is measured by the power to condemn, and this it does valiantly, if somewhat speciously. It can find no authority for its contention either in the despised text books or in the much prized cyclopedias. The nearest approach to decided cases bearing on the proposition, found by respondent, are those cited in the cyclopedias to the general proposition that a railway company cannot dispose of or use its right of way so as to destroy or impair its ability to serve the public, a limitation which we have insisted on from the beginning as the only limitation that governed the railroad company in the making of its dedication.

So far as its argument on reason goes it seems a sufficient answer to say that the power to dedicate might well be considered the measure of the power to condemn, but that the considerations governing dedication and condemnation are so essentially different, that the power to condemn cannot be made the measure of the power to dedicate. For instance, the very authorities cited by respondent present no other limitation on the power to dedicate parts of rights of way than that the dedication must not destroy or impair the ability of the railway to serve the public. The authorities on the other hand, presented by re-



spondent with reference to the power to condemn railway rights of way, deny the power in any case or to any extent.

Complainants, on the other hand, are not without authority to the proposition that railway companies may dedicate streets out of parts of their right of way, and those authorities are cited on page 34 of the principal brief,—to which we now add the much cited case of *N. P. Ry. Co. vs. City of Spokane*, decided by this court. The court in that case not only upheld the dedication of Railroad Street as consistent with the purpose of Congress in making the grant of the right of way, but also as consistent with the general charter powers of the railroad company. After noticing and distinguishing state cases cited as opposed, on the ground that a diversion of any part of the right of way was contrary to the charter powers of railway corporations, the court concludes its opinion in these words:

“This is far from holding that a railroad company may not, in recognition of public interests, and for the promotion of the public welfare, dedicate to the public an easement over its right of way which does not interfere with its own use of the same for a railroad.”

Finally, on this branch of the case, respondent calls the dedication in question a mere paper dedication, assimilates the action brought by complainants to one for specific performance, and cites authorities to the proposition that the courts will not give their

aid to the specific performance of contracts that are unconscionable, oppressive or iniquitous. We shall not notice this threefold contention at any length.

As to whether or not the dedication was a mere paper dedication, never acted on by the dedicator and the public, we cite the court to the testimony on the subject of Railroad Street and the use made of it by the public for nearly ten years, found in the record, and quoted from in our principal brief.

On the proposition that the action is one for specific performance, we say that it is one to enjoin the obstruction of a street, and that it sounds in tort rather than in contract, because it is founded on the jurisdiction of Courts of Equity to enjoin the construction and maintenance of nuisances.

On the last branch of the proposition it is only necessary to recall a few facts to show that it is the defense here that is unconscionable and iniquitous and not complainant's case. After dedicating Railroad Street, selling the lots on it on the strength of the fact that it was a street, watching and encouraging its growth as a street for ten years, seeing it built on on both sides by its grantees with improvements costing many millions of dollars, the Railway Company now comes into court and presents the twofold defense against legal proceedings to prevent its aggressions, that it took the money of its grantees under false pretenses, and that since the supine conduct of the public authorities enabled it to steal one-half the street, it ought now to be permitted to steal the other half.

## THIRD

*Did the Railroad Company, in and by the Town Plat  
Filed by It, In Fact and in Law, Make a Statu-  
tory Dedication of Railroad Street?*

Respondent sets out the statutes of Washington Territory (1881) governing the platting of townsites, and deduces therefrom that no writing on town plats in the nature of a formal dedication was necessary or called for by those statutes. It says therefore, that "the writing upon the plat of Railroad Addition added nothing to the effect of the plat itself, so far as the dedication of the streets shown thereon is concerned." If the deduction thus drawn from the statutes be correct, and we are not disposed to question it, although we thought it sufficiently questionable in the outset to omit it from our argument, then we say the deduction does not go far enough. The writing on the plat added nothing to it for any purpose. It was so much waste paper. If the plat itself is the thing and the writing nothing, the writing might as well not be there at all. The only way a townsite proprietor could protect himself under the townsite laws, would be to be very careful that he marked nothing on his plat as a street, alley, park, or other public convenience, that he did not intend to dedicate to that purpose. And if, as respondent insists, the legal staff of the railroad company must have been familiar with the law, and therefore made the written

reservation found on the plat to avoid its effect, it argues great recklessness of the interests of their client and very little comprehension of means to ends, to base protection on a confused writing, not called for or recognized by the law, instead of erasing the words "Railroad Street" from the map and inserting in lieu thereof the words "Railroad Reserve."

Respondent does not very clearly press home any deduction from these statutes except to say that "under the conditions appearing here and the rules of law governing such cases, no doubt can be entertained as to the purpose of this writing," meaning thereby, we presume, that its purpose was to create an exception rather than a reservation. But why is such purpose so evident? If, notwithstanding that the law contemplated no writing, it was still thought a writing would have some force and effect, and that the interests of the railroad required that its right of way be protected by such a writing, what is there in those facts that points so conclusively to the intention of the railroad company to protect its interests by an exception rather than a reservation? The argument of respondent on the point seems to us a complete *non sequitur*, and to leave the matter exactly where it was before, neither advancing nor retarding a determination one way or the other.

We next notice the contention of respondent that the railroad had been completed through Spokane before the making and filing the town plat. The fact



is not very material in the construction of the writing on the town plat, but as opposed to the recollection of Mr. Simonson, who is not and never has been a resident of Spokane, we oppose the testimony of Dr. J. E. Gandy, who said: "Have lived in Spokane since March 19, 1880, a little over thirty-three years. Northern Pacific was not at that time completed to Spokane; the survey was made but there was no construction here then. The road was constructed through Spokane in 1881, the summer of 1881." Record, p. 219. It is extremely unlikely that the road was completed in advance of the filing the map of definite location, and that occurred, as the document itself shows, on the 4th day of October, 1880.

With reference to the line of authorities set up by respondent to establish that the writing on the town plat must be construed to be an exception rather than a reservation because it is the saving of a right already in existence and not the carving out of a new right, we have little to add to our principal brief, except to say that the same line of authorities was pressed on this court in the case of *N. P. Ry. Co. v. City of Spokane*, and that the point was then disposed of in these words: "It is contended that the words of reservation concerning Railroad Street operate to except from the dedication all the land contained within the north and south lines of that street, and to cut in twain the streets which upon the plat are indicated as crossing the same. It is obvious that the plat and the words of dedication are to be construed together in

arriving at the intention of the dedicator. With this rule of construction in view, *it is clear that Railroad Street is reserved from dedication to public use, so far as it is necessary to be retained for the tracks and uses of said railroad company*, but that at the same time, and co-existent with the reservation, the company has granted by its dedication to the public the easement to cross its tracks and right of way at certain fixed and designated points." This language, it is true, was used with respect to the cross streets, because those streets were the only ones then in controversy, but it is difficult to see how the same identical writing can be construed as a reservation for the purposes of the cross streets and as an exception for the longitudinal street. And it will not do to say that the court was speaking loosely, and without having the distinction between exceptions and reservations clearly in mind, because it was to that distinction, pressed on it with force and earnestness, that the court was directing its remarks.

We will hazard one other thought pertinent to the point pressed on the court by the respondent and then pass on. The cases it presents have no point unless the right of way of the railroad company be itself an easement. It speaks of it as right of way throughout its brief, thus giving it character as a mere easement, and with the evident purpose that it shall be so understood. But it is not so at all. In the language of the Townsend case the grant of the right of way was "in effect the grant of a limited fee." In dealing with that fee and utilizing it in part, as it might do,

for another public purpose, the reservation answers all the tests of the rule laid down by respondent.

Complainants assent unreservedly to the proposition that "an intention to dedicate will not be presumed, but must clearly appear." If, upon all the facts of this case, the intention to dedicate Railroad Street does not clearly appear, then, of course, complainants have failed in their contention. But the principle has little, if any, application in the connection urged by respondent. The writing on the plat must be construed in the light of certain principles and in connection with all the facts, and in doing that, the court is not to be restrained or aided in giving the proper construction by unfavorable intendments or the reverse.

In this connection respondent insists that the writing on the plat is so clear and unequivocal as to forbid the resort to anything else to determine the intent of the dedicator. But this court did not think so when the plat was under consideration before. It then said that the plat and the dedicatory words must be construed together. More than that, it considered and gave effect to the use of the streets by the public, to the acquiescence by the railroad company in such use, to the sale of lots fronting on Railroad Street and having no other means of access than Railroad Street, and to the agreement between General Sprague and Mr. Browne about the laying out and dedication of Railroad Street. And the court was right in doing

so. Even if the dedicatory language was clear, which we deny, it is opposed with an equally clear designation on the plat of Railroad Street as a street. Does not this create an ambiguity which makes extraneous evidence admissible? Especially in view of the fact, as brought out by respondent, that it is the plat alone that counts under the statutes in force at the time the town plat was made?

Complainants did not, as respondent suggests, introduce evidence tending to establish that the plat of Railroad Addition was a standard form adopted by the railroad company. They introduced evidence showing that a Railroad Street was shown on the town plat of three other towns on the line of the railroad west of Spokane within the railroad right of way, and that the dedicatory language on those plats was identical with that on the plat of Railroad Addition to Spokane Falls, and that all four of the plats were acknowledged on the same day. They also introduced evidence showing that those streets have been maintained as streets to this day in the other towns, and that in some of them Railroad Street was the principal street of the town. That four town plats of paper towns, made and acknowledged by the same dedicator on the same day, should be in the same form in every respect, is not remarkable, and that fact alone would not aid in giving them and the writing thereon any particular construction. That out of the four, the Railroad Streets of three of them have been maintained to this day, is, however, a strong and cogent



fact, in connection with the other facts, to show that the Railroad Street of Spokane was in fact intended to be a street, and that that intention would never have been questioned but for the unexpected growth of Spokane into a city of exceptional importance. The cogency of the facts thus shown cannot be weakened by the suggestion that the town plats of the railroad company had been standardized. That is a pure figment of the imagination.

With the cases from the state of Washington and from other states, cited and quoted from by respondent, on the subject of dedication, and in which an absence of intent to dedicate was found, we take no issue. It would have been remarkable, on the facts of those cases, if the necessary intent had been found. In none of them was the alleged street called a street on the plat, nor were there any facts raising the necessary implication that it was intended to be a street. In several of them the designation on the plat of the parcel of land claimed to have been dedicated was such as to show an affirmative purpose not to dedicate.

In *Provident Trust Co. v. Spokane*, 63 Wash. 92, the strip of land twenty feet wide claimed to have been dedicated lay between two platted streets, Hill Street and North Street, but was separated from them on the plat by a line drawn the entire length of the strip. The strip had on it at the time of dedication a street railway and was marked on the plat with the letters "R. R." There was nothing in the case but

the town plat, and it is difficult to understand how the court could have reached any conclusion other than that there was no intention shown to dedicate the strip as a street.

In the case of *Baker v. Vanderbürg* (Mo.), 12 S. W. 462, the plat in question showed a block of ground surrounded by streets, and upon the block was written: "This Park is reserved from public use and title kept in proprietors."

In *Lever vs. Grant*, 102 N. W. 848, the strip of land in controversy was marked on the plat "private way," and this private way was expressly excepted from dedication by the writing on the plat. True it is that that writing called the strip of land the "north thirty feet of Custer Avenue," but the court declined to accept that language as descriptive of the strip and as overruling the marking on the map designating it as a private way. We might very well claim that this last case, so far as it touches the present case at all, is an authority in our favor, but as matter of fact it, like the other cases, merely illustrates the very reasonable principle that a dedication will not be presumed but must be affirmatively established. We do not fear that principle.

There is, however, another principle, to which we adverted in our principal brief, that has an important and controlling influence in the construction of town plats having the features of that under consideration—that is to say, plats which

have writings on them that might be construed in a way to contradict the markings on the plat itself. Town plats are in the nature of deeds to the public and must be so construed. In such deeds every intendment is against the grantor. Ambiguous expressions and contradictory clauses must be construed against him and in favor of the public. Said the Supreme Court of Illinois in such a case:

“When a deed is so drawn that some will read it one way and some another, it is a well established rule that that meaning shall be adopted which is adverse to the interests of the grantor. In Cruise’s Digest, title 32, Deed, chapter 19, section 13, the rule is thus stated: ‘A deed is always construed most strongly against the grantor, *verba chartarum fortuis accipiuntur contra proferentem; et quaelibet concessio fortissime contra donatorem interpretanda est.* For the principle of self-interest will make men sufficiently careful not to prejudice themselves by using words of too extensive a meaning. And all manner of deceit is hereby avoided in deeds; for people would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them.’ If there be ambiguity in this deed, in no case could this rule apply with more reason or justice. Here the parties have made their deeds and spread them upon the records of the county for the inspection of the public, whereby they have made certain dedications, the object and effect of which was to invite purchasers and improvements, and to enhance the value of the residue of the town property. In that way they expected to be remunerated for the dedications thus made, and every man who purchased a lot of them, or made improvements there, paid a proportion of the consideration, for the property donated to the public. To say the least of it, these deeds were so drawn as to induce a large propor-

tion of purchasers to believe that the premises in controversy were dedicated, and thus they have received a consideration from the public for this very land, and to allow them now to say that they did not intend to include it, is to allow them to practice a palpable fraud upon the public; and to take advantage of their own wrong. This the plainest dictates of common honesty forbid. The law will not allow them to affect ambiguous expressions, and then permit them to put their own construction upon them. Here the words are emphatically their own, for the grantees—the public—were not there to dictate or suggest, and certainly the principle of self-interest was sufficient to make them ‘careful not to prejudice themselves by using words of too extensive a meaning.’”

*City of Alton v. Ill. Transp. Co.*, 12 Ill. 37.

The Supreme Court of Florida had occasion to consider a case on all fours with the case at bar, and in its determination applied the principle to which we have referred. In that case there had been a town plat with a block of ground delineated on the plat and marked “Park.” The writing on the plat, after making certain reservations, continued as follows: “also reserving that certain strip of land which lies on the easterly side of Biscayne Bay drive,” etc., the block marked on the plat as a park being a part of the strip of land lying on the easterly side of the Biscayne Bay drive. The court properly treated the attempted reservation as an exception, but declined to give effect to it, saying:

“What, then, is the proper construction of the plat with respect to the strip of land lying between Biscayne Drive and the bay, and the water rights appurtenant thereto? Only that portion



of the strip extending from a point opposite the center of Third Street is designated as a park on the plat, but that portion is plainly marked in large letters 'Park.' We have shown that the marking of the parcel in this manner indicates that the parcel was dedicated for a public park. The dedicatory statement purports to reserve the entire strip. There is consequently an apparent inconsistency between the different parts of the plat. How, then, should it be construed? The plat is a written instrument, and, like all other documents, must be construed as a whole, in order that the intention of the parties may be ascertained, and every part of the instrument be given effect. *City of Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1, 29 N. E. 484. If the document is ambiguous, the construction must be against the dedicator and in favor of the public. *Elliott on Roads & Streets* (2nd Ed.), Sec. 119."

Then, after quoting at some length from *Alton v. Illinois Transp. Co.*, *supra*, the court proceeds:

"If by reason of the words 'also reserving,' used in this clause, we should construe the reservation to be similar to the reservation in the preceding clause with respect to streets, as contended by appellees, then the reservation would include simply the reversion when the park should be discontinued by law, and this reversion would be secured, not to dedicators, but to persons owning lands abutting or adjoining the strip so dedicated as a park. No person would own lands abutting or adjoining the park to whom the reversion could be made applicable. Lots west of the strip abut upon Biscayne Drive, a public street, and not upon the park. No lots lie east, simply the bay. A construction which would secure the reversion in the property alleged to be a park to the owners of lots abutting Biscayne Drive, on the theory that those persons own lots abutting or adjoining

the park property, will not only obviously violate the real intention of the dedicators, but strain the language used beyond the most liberal interpretation. Neither can we interpret the instrument as meaning that the dedicators reserved the entire strip for a private park. There is nothing to indicate that the word 'park' was intended to have such a meaning. There is no intimation anywhere upon the plat that the parcel marked 'Park' was to be reserved as a private park. \* \* \*

"Nor can we accept as sound the suggestion of appellant that the reservation clause shows clearly an intent to reserve from dedication the entire strip of land between Biscayne Drive and the bay, for to do that we would be compelled to deny any effect whatever to the word 'park,' written upon a portion of the strip, which word, as we have seen, imports a dedication to the public for park purposes. The rules of construction do not authorize us to reject any portion of an instrument as meaningless if that can be avoided, but rather to harmonize and give effect to the whole."

*Florida East Coast Ry. Co. v. Worley*, 38 Southern 618.

The case is a little remarkable in its similarity to the case at bar, even down to the contention that the city of Miami was an indispensable party to the litigation. The land company sold lots with reference to the plat; very soon after the making of the plat it caused an abstract to be made in which it was claimed that the Park tract was reserved; the company gave leases to many persons of certain portions of the Park; some residents understood that the land was set aside for a public park, others that it was private property; the city authorities never exercised any authority or

control over the tract of land, and after the land came into possession of the railway company the city, at the suggestion of the railway company, passed a resolution declining to accept the dedication of the land as a park; it was not returned for taxation for several years but after that was taxed; and finally the railway company had been in possession of it for many years and had erected and maintained its terminals on the land throughout all the time.

We respectfully insist that the principle of these cases is controlling of the present case. The inconsistency between the plat and the writing on it, if the writing be interpreted as respondent insists, is so great that it is impossible if effect is to be given to the plat as well as the writing, to accept that interpretation. It is the duty of the court, as declared by the Supreme Court of Florida, to "harmonize and give effect to the whole." The interpretation insisted on by complainants does that. It is not an unreasonable interpretation, and it is one that coincides with all the other features of the plat, with the dealings of the parties, and with all the surrounding circumstances.

In conclusion we notice, briefly, the quotation from Judge Rudkin's opinion, contained in respondent's brief, respecting an estoppel against the abutting property owners. We have great respect for Judge Rudkin, but his suggestion that it would be easy to raise an estoppel against the property owners was entirely gratuitous. There was no issue of estoppel

in the case, and Judge Rudkin did not know that the property owners had stood by while permanent and lasting improvements were under way, because the property owners were not called on to repel an estoppel arising from that fact, and did not attempt to do so. The same fact should have restrained counsel for respondent from indulging in the jibes at complainant who happens to be one of the counsel in this case, found throughout respondent's brief. The fact that the entire matter is outside the case justifies complainants in saying that there is on file in the archives of respondent conclusive evidence that the particular complainant named is not estopped on any point in this case by acquiescence, and counsel for respondent ought not to be ignorant of that fact, if, in truth, they are ignorant of it.

*Did the conduct of the Railroad Company and the public, in the use of the street for a period of nearly ten years, effectuate a common law dedication of the street to the public?*

Respondent on this question draws a fancy picture which can only be sustained by suppressing most of the facts of the case, inventing others, and giving a desingenuous color to the remainder. It first premises that the Railroad Company anticipating that ~~none~~<sup>some</sup> of the towns laid out by it would grow into cities, but not knowing which, platted all of them in uniform fashion, laying off Railroad Street in all of them as a kind



of Railroad reserve both for the use of the Railroad and the public, but without any intention to dedicate it to public use, and then proceeds: "During this formative period the strip was used by any person who found it convenient to do so for any desired purpose so long as such use was consistent with all the desired Railroad uses. The semi-public use of such strip continued until it became inconsistent with the Railroad use, and then it was by the Railroad Company abrogated. Such use in the communities that did not grow continues down to the present time. In Spokane it continued for a number of years, gradually being decreased as the needs of the Railroad Company increased, and finally being put an end to a number of years ago."

The respondent is here assuming two facts that do not exist as the atmosphere of the picture. First, that the town plat of every town and village through which its line ran was laid off in uniform fashion. There is not only no evidence of that fact, but it is not a fact. Second, that the strip was reserved for railroad tracks and uses, that is to say, reserved in the sense that it was excepted from dedication. We think we have heretofore shown that there was no such exception of the strip in question. But we pass all that by because it is only a part of the atmosphere surrounding the picture.

The picture itself is that of a permissive use of Railroad Street by the people of Spokane, having no characteristics of real street use more than the use of

other open spaces during the early history of the city, and a gradual drawing in and restriction of that use as the necessities of the Railroad Company required until the public had been wholly excluded; and then, having drawn the picture and exhibited it in its every light with the pardonable pride of an artist the respondent declares: "It follows that there was no use here for such a length of time as would fix Railroad Street as a public highway." This is what respondent calls in its brief building up a man of straw to knock it down again. Where in the picture is exhibited the energetic agents of the Railroad Company showing off to the public the lots abutting Railroad Street, and expatiating on the advantages of that thoroughfare as a wide and desirable street? Where does it show General Sprague and Mr. Browne in conference arranging for the dedication of Railroad Street through their respective properties? Where does it show the plat of Railroad Street with no means of access for lots abutting on it unless the street be a street? Where does the picture show the bustle of an energetic, growing community building up the street with wholesale and retail business houses, with hotels and restaurants, saloons, barber shops, blacksmith shops and fruit stores, interspersed here and there with residences, until as one witness expressed it, the street had been built on continuously, although not solidly, throughout its entire length on both sides, and in some of the blocks on the north side had been built up solidly? Where is shown the Railroad Company contemplating

without protest the growth and development of the street for ten years by its upbuilding on lots sold by it, while its busy agents were pounding the public on the back to buy more lots and pay more money for the purpose of putting up more buildings on the street?

All this is excluded, and respondent would have the court look only at the free and easy habits of the people of a new Western town in the matter of locomotion as fixing the character of the use of Railroad Street, and at the corporate greed, which, after the establishment of the Street, has induced the Railroad Company to endeavor to filch it from the public.

In every street controversy, particularly if it goes back for any length of time, some witness or witnesses may be found on each side of every proposition of fact, the result, no doubt, of a hazy recollection spurred to activity by a general desire to have a look in investigations involving questions of public neighborhood interest. On this question of the user of railroad street, however, respondent could find only three witnesses who would stand with it, the witnesses Cook, Glasgow and Newberry, and even their testimony must be wrenched from its context to give it the color desired by respondent. Respondent did call one other witness to the point but his testimony was disappointing and is not quoted. We refer to the witness Edward C. Miller, who said: "Railroad Street in those days was used on both sides as a thoroughfare, people driving back and forth, going either west or east to the freight depot or passenger depot \* \* \* other people besides those going to the depot could use it if

they wanted to, could go anywhere they wanted to." Record, p. 342.

The little value to be attached to the stray expressions of the three other witnesses called by respondent concerning the nature of the travel on Railroad Street, will be readily seen when all their testimony is read. For instance, the witness Newberry said on cross examination: (Page 315 of Record).

"I can't recall any hotel on the north side of Railroad Street but the Sprague House. Might have been more. I think there was one west of that, but I am not positive. I can't answer as to the number of saloons. I can't recall what merchandise stores there were on the street. I wouldn't say there were not any. There were some agricultural implement people, something of that kind, before the fire, I recall.

On the south side of the track there were some residences, and one store adjoining where I lived. I can't say as to residences on the north side. You see there was so much of these things wide open and the streets were not graded, and it would be pretty hard to say just where a house was. The only place where there was a graded street at all was Riverside Avenue.

It was a good while ago. I am pretty hazy as to the buildings that were on either side of the track. I was a very busy man in those days, running back and forth across the continent, chasing the railroad and I was paying more attention to other things. They didn't impress themselves on me, that is all."

The witness Cook said on cross-examination: (Pages 317 and 318 of Record).

"During most of the time before the fire, I lived on my claim, about a mile and a half south



of the track. During that period I did not buy or sell any lots in Railroad Addition; except one on Second Avenue and Post.

I remember the Taylor and Sharkie building. My recollection is that it faced Howard; it may have faced the railroad also. There may have been buildings on the north side of the track between Stevens and Howard, but I don't call to mind any. There may have been some between Howard and Mill, and between Mill and Post, and Post and Lincoln. I think there were buildings between Lincoln and Monroe. I guess those that were built, if they did not face the side streets, had to face the track if they were going to do any business.

My recollection is not distinct about every building and the size of the building and where it stood and how many in a block. I know people could drive parallel with the track, and did drive there for several blocks, within a space of 100 feet of the railroad track—something like that."

As to the incident related by Mr. Cook about being required on one occasion to go from the front of the warehouse to the back to get his freight, dilated on by respondent as an evidence in that early day of a denial of the rights of the public in Railroad Street, it requires an ingenious imagination and a facile pen to give it any such complexion.

The witness Glasgow said on cross-examination: (Pages 320, 321, 322 of Record).

"Before the fire there were some buildings on the track on Railroad Street between Howard and Mill, fronting on Howard. There were some buildings on the north side between Post and Mill Streets, facing the track. I don't remember what

they were. I have no idea of the character of business that was done in them. There were buildings between Post and Lincoln Streets on the north side. I don't know that they faced the track; they might. It seems to me there were some buildings between Lincoln and Monroe, but they didn't face the track as I remember it. \* \* "They could drive through if they wished from Post Street to Lincoln. I don't think they drove from Lincoln to Monroe, although I don't know. There was a hide and fur depot in there; Behrend built that very early; I think in '82 or 3. I think the Taylor and Sharkie place fronted on Howard Street, but can't swear to that. Looking at this picture I think it faces north (toward the railroad track)." The picture referred to was then offered in evidence as Defendant's Exhibit 30.

The fur depot referred to, was on the north side of the track near Monroe Street. It might have been one or two hundred feet from the track, I can't say."

Now how ridiculous and absurd to catch up a few phrases used by these witnesses concerning the irregular character of the travel in Spokane in early days and the disposition of people to utilize short cuts in going to and fro, put into their mouths generally by counsel, as establishing against the host of witnesses called by Complainant, and against the necessary and controlling inferences to be drawn from the upbuilding of Railroad Street shown by these witnesses and not denied by any witness for the respondent, that Railroad Street was only used by the public intermittently and permissively, and so long as such use was not inconsistent with all the desired railroad uses! It is almost an insult to the intelligence to argue

to any one that the travel on a well defined and well built street, such as Railroad Street is shown to have been for ten years after its establishment, was a permissive use, and was considered either by the Railroad Company or the public a permissive use. And in view of that fact it may seem unnecessary to recapitulate the testimony of complainant's witnesses on this point, but at the risk of seeming tedious, we do so very briefly. We omit everything relating to the character of the buildings on the street, and the nature of the business carried on in them and confine our quotations to the question of the character and extent of the travel on the street.

Dr. J. E. Gandy: "It (Railroad Street) was used as the principal driveway to and from the Passenger Depot from the down town district, which was then on the corner—the business district was then on lower Howard Street from Front Avenue South, a block and a half probably. It was used as much as any street in town, except possibly Howard Street, and possibly Front, that is, talking now of the early history prior to the beginning of 1883 and 1884. It continued to be a used street, much used street, up to the time of the fire, the big fire in August, 1889, August 4th, 1889. That fire swept away everything on Railroad Street east of Lincoln Street. \* \* Compared with Front and Main Streets, well in the early history Front and Main were much more prominent than Railroad Street, that is, from 1880 up to the next two or three years. But as time went on

Front became less and less used, Railroad more and more used. Up to the time of the fire Front Street had become principally a second class street, while Railroad Street had improved very materially in that five or six years. \* \* \* People did not drive along there (on north side of the track) promiscuously, there was a well defined roadway close to the railroad track, not right close to it, it was between our building and the track"

Record, pp. 220, 221; p. 223; p. 229.

H. J. Shinn: "I have driven over this street a great number of times; it was used universally by the public. \* \* \* They traveled on Railroad Street promiscuously, now on one side (of the track) and now on the other. In travelling along, at times you might be on Railroad Street and at other times on private ground. They generally followed the line of the railroad."

Record, p. 234; p. 236.

Lucius G. Nash: "That street (Railroad) was constantly used from 1881 to the time of the great fire in 1889. It was used by the public as a thoroughfare. \* \* \* I have ridden on it many, many times as a boy. Railroad Street on both sides was used habitually by the public as a street; that is all there is to it."

Record, p. 247; p. 248.

Frank Johnson: "It (Railroad Street) has been used continuously, considerably by the public as a thoroughfare; was even before I built this Depot, because it was a well beaten road at that time. It was



used on both sides of the track, but of course was used more on the north side than the south side. \* \* \*

It made a pretty good thoroughfare because there was a great deal of heavy hauling done over those roads at that time. \* \* \* There was nothing to prevent anybody travelling around there pretty near as they pleased. Generally of course the road was naturally more beaten up and down the avenue here (R. R. Street) because it was used more, and consequently a person will go where the roads are broken rather than across the gravel."

Record, p. 251; p. 252; p. 253.

W. S. Norman: "Up to the time of the fire Railroad Street within the limits I have described (Howard to Monroe) had been used as a public thoroughfare by the public generally, and has been used ever since in a confined form—until a few weeks ago there was a roadway about sixty or eighty feet wide, between the service track to the warehouses and the main track."

Record, p. 257.

M. S. Bently: "In 1882 it was a street the same as the others. \* \* \* People did not drive wherever they chose along the track. There was a marked street there. South of the track and north of the track and north of the lot line."

Record, p. 262; p. 264.

Rufus Merriam: "During that period (1888) the street was pretty generally used from Lincoln or Mon-

roe on the west to Stevens on the east. \* \* \* \*  
 When I first came here there was a great deal of travel longitudinally with the track on Railroad street. Since the fire there has not been so much travel there."

Record, p. 266; p. 267.

D. M. Drumheller: "As to the condition of Railroad street from the time it was platted to 1889, practically all the travel and traffic from the main part of town went down Howard Street to the track and then down Railroad Street to the Depot backwards and forwards. \* \* \* As far as I know the general understanding was that Railroad Street was a street. It was always considered a street. \* \* \* People having buildings on Railroad Street used the street to get to and from their buildings. People living south of the track and further west also used the track to get down to the neighborhood of their own buildings."

Record, p. 269; p. 270; p. 271.

J. B. Blalock: "It was used by the public generally as a highway up till 1889 and was built on from Monroe pretty much up to Howard Street, probably five or six blocks I should think. \* \* \* The general understanding and report in the city as to Railroad Street was that it was a street the same as any other. There was lots of travel on it, there was business there. \* \* \* Riverside Avenue and Howard Street were of more importance; I don't think that Main was of as much importance as Railroad Street, nor Front. \* \* \* By the importance of a street

I mean the amount of teams and vehicles and traffic that went over it."

Record, p. 271; p. 272.

Thomas Thwaite: "They all used the street, it was a street then (1886). \* \* \* The street was generally used from Stevens to Jefferson Street."

Record, p. 273; p. 274.

George Turner: "The street was then (1884) being used by the public as a street, that use and the condition of the buildings on the street continued up until 1889, at the time of the fire. \* \* \* Railroad Street was then used by the public as a thoroughfare as well for reaching the Depot, which was down on Post Street, as in reaching these buildings on each side of the street, for the purpose of ingress and egress, and also for the passage of vehicles east and west off Railroad Street. \* \* \* I could not identify the particular point where the traffic commenced or ended on the street, but I will say, generally, from about Stevens Street on the east to Lincoln Street on the west."

Record, p. 275.

C. J. Craig: "From 1882 to 1889 the street was generally used as a street, that was principally used by people coming from Brown's Addition into the city here. I used it nearly altogether then. I could come up Railroad Street and then take a cross street to go down town. I used to see the other residents coming that way frequently. \* \* \* We didn't use

Railroad Street much after the fire. The whole city was burned up and we travelled most any way."

H. A. Holland: "I recall the condition of Railroad Street between 1881 and 1889. It was used by the public generally as a street. \* \* \* The street was travelled east as far as Stevens and west to Monroe. \* \* \* The street it still open on the south side, in front of our property, except the railroad track."

Record, p. 288.

This testimony could have been augmented indefinitely, if it had been anticipated that any question would be made, but the admission of Mr. Graves, leading Counsel for respondent at the trial, seemed to make it unnecessary. Even without that admission, it would hardly have been proper for complainant to duplicate its testimony indefinitely. The Court will see that the witnesses who were sworn were among the oldest and best citizens of Spokane, and in view of the uniformity of their testimony as to the nature and character of the travel and traffic on Railroad Street, it is impossible to doubt that Railroad Street was a well travelled street, a distinctive street, as much a street as any other street in the city from the time of the making the town plat down, at least, to the great fire of August 4, 1889. When to all this is added the character of the improvements on the street, the conduct of the Railroad Company in inviting and promoting that improvement, throughout the entire time, the testimony showing the origin of the street to have



grown out of the agreement of General Sprague and Mr. Browne, and the testimony showing the entire absence at any time of an assertion of an exclusive right by the Railroad Company, it is impossible, we respectfully submit, for this Court to reach any other conclusion than that the Railroad Company intended to and did dedicate Railroad Street, to the use of the public, and that the use of the street by the public was so full, perfect and complete that it constituted an acceptance by the public of the dedication. We are speaking now of a common law dedication. Of course if the statutory dedication was complete the question of common law dedication is immaterial, and we believe that it was complete; but we have sought to make assurance doubly sure, by establishing at the same time a complete common law dedication. Instead of the promissive use of the street, gradually withdrawn as the necessities of the Railroad required, pictured by respondent, we have shown a use so full, perfect and complete in every way, and extending for such a length of time, and, marked with such evidences of acquiescence, not in a permissive use but in an established lawful use, that unless all inferences from human conduct are to be discarded, Railroad Street had become established as a street at the time of the great fire in 1889.

The respondent was permitted to introduce the evidence found in the record, concerning the progressive use of Railroad Street for warehouse purposes, made tentatively at first and confidently and aggressively at

a later period, on the theory that it went to the question of the intent of the Railroad Company in the matter of the dedication of the street; but we submit that it throws no light on that question, and that, since there is no question of estoppel, abandonment or adverse use in the case, its reception was improper for any purpose. In considering the question of common-law dedication there must be some point of time to which the Courts can refer and say the dedication was or was not complete at that time. The conduct of the parties after that time, and particularly the conduct of the dedicator in attempting to resume his dominion over the street, cannot be permitted to influence the rights of the public. The authorities to this proposition were collected and discussed by Mr. Elliott in his work on Roads and Streets, cited in our principal brief. Now we say that Railroad street became a street by the conduct of the Railroad Company and the public, if not before, at least by the time of the great fire of 1889, and we admit that if it had not then become a street it never has been a street. Therefore it is wholly immaterial what view the Railroad Company and the municipal authorities acted on after that time. If the street was then a street it could not be lawfully resumed by the Railroad Company, and the rights of the public in it could not be surrendered by the city. And we assume as a proposition that needs no authority, that the city could not do by inaction or indirection what it could not do affirmatively and directly. Its silence during the period of encroachment by the Railroad Company could not

confer rights in the street after it had become a street, nor could its action in taxing the right of way either generally or by local assessment, have that effect. Such conduct of the public authorities during the period when the alleged dedication was ripening would of course be competent evidence on the question of dedication or no dedication, but after the street had become fixed as a street, it was immaterial for any purpose.

The respondent has naturally made much of the supine conduct of the municipal authorities in permitting the street to be obstructed to the extent that the evidence shows it to be obstructed at the present time, but the Court cannot, consistently with the law, give any effect to that conduct; and when it remembers the influence of a great trans-continental railroad, exerted, not only over municipal authorities, but over business men applying for and receiving its favors, the men interested in acquiring the abutting lots on its right of way in order that they might receive its favors, it cannot greatly wonder that the Railway Company has thus far gone on victoriously in the course marked out by it.

This brings us to the thought shadowed forth in various parts of respondent's brief, but never laid down anywhere as a distinct bar to relief here, that these complainants, abutting owners, are in some way estopped by not having sooner complained.

We say in respect to that that if respondent desired to estop the complainants it should have pleaded estoppel and thereby given them an opportunity to rebut any inferences arising against them from the encroachments of the Railroad Company shown by the evidence.

We say further that there is no principal of law that can be invoked to make an encroachment in a part of a public street an estoppel against abutting owners to complain of further and additional encroachments.

Moreover, as to three out of the four complainants here, their property is on the south side of the street. There never has been any encroachment on that side, and the street has ~~even~~<sup>ever</sup> been an open street on that side one hundred and twenty-five feet wide. They have never before been hurt and have never before had occasion to complain. Now however it is proposed to take away street access to their property and to darken the ground floor of their buildings by a structure higher than their second story windows and approaching the front of their property within a few feet. We say on these facts that they have not been remiss in not before complaining, and that there is nothing in their conduct which requires a Court of Equity to deny them its aid in the protection of their clear legal rights?

We do not deem it necessary to notice the authori-



ties referred to by respondent and going to the question of the requisites of a common law dedication. The vital principle underlying all dedications is the intent to dedicate, and where that intent is to be made out by conduct the inferences from the conduct must be clear and convincing, and will not be aided by presumption; and there must be an acceptance by the public, and where that acceptance is to be made out from user the like certainty as to the acceptance must flow as a necessary inference from the user. No authority can or does state the law more strongly against us. We accept it as stated and are willing to have the question of the common law dedication of Railroad Street measured by it.

We will notice one or two minor points and then conclude this brief. Respondent introduced in evidence, and quotes in its brief and comments thereon, a part of a circular addressed to the public in 1908 against the attempt made in that year to secure the assent of the City Council to the dismemberment and disfigurement of the city by the building of a broad and high dirt fill through the center of the business district. That circular was written and signed, along with others, by one of the complainants herein who is also of Counsel in the case, and respondent says of it: "It is clearly apparent from the language used that Judge Turner no more supposed in 1908 than he did in 1892 that Railroad Street was a public highway but considered it on both such periods to be the private right of way of the Northern Pacific Railway Company."

This comment is made notwithstanding the explanation of the circular letter made by Judge Turner in his testimony and in the face of his declaration when on the witness stand that in a number of addresses made to the City Council in 1908 he clearly and explicitly and positively took the position that Railroad Street was not the private right of way of the Railway Company, but was one of the public streets of the City of Spokane. He did not, it is true, explain why this contention was not carried forward and embodied in a document addressed to the people from another standpoint and intended to influence many men of many interests. He was not asked to do so. The matter is not of any importance because what Judge Turner thought in 1908, if he thought as respondent suggests, cannot be the measure of the rights of complainants in this litigation. Judge Turner would like to have his opinions accepted as the measure of the rights of his clients, but unfortunately a somewhat extended experience with the Courts has disabused his mind of any such vain hope.

We cannot believe that Counsel for respondent are serious in the suggestion that there is any inconsistency between the position of complainants here and that of the city in the Mill Street litigation twenty years ago, and brought to this court under the title, "The Northern Pacific Railroad Company vs. the City of Spokane." That was an action brought by the Railroad Company to enjoin the City from tearing down a temporary freight depot built in Railroad Street and across Mill Street. The city might have taken the position in that

case that the depot building was an obstruction in Railroad Street as well as a closing of Mill Street, although to have done so would have been to raise unnecessary and, what counsel may have then thought, troublesome issues. The city chose to stand on the closing of Mill Street. In doing so it admitted neither expressly nor impliedly, neither as matter of fact nor as matter of law, that Railroad Street was not one of the established streets of the city. The matter is dragged into this case by the hair of the head, because none of the complainants here were parties to that action and no plea of res-judicata is made even if they had been parties. The purpose apparently was to have a little more fun with Judge Turner by again convicting him of supposed inconsistency on the strength of that case. Well all we have to say about that is, that if respondent can get any fun out of Northern Pacific Railroad Company vs. the City of Spokane, its cheerful optimism is unbounded, and worthy a better result than it is likely to receive at the hands of the Court that rendered the decision in that case.

This reply brief, while not provided for by the rules of this Court, has been prepared pursuant to an understanding with counsel for respondent, that complainants would prepare and serve their original brief in advance of the time fixed by the rules of the

Court, and that respondent would then prepare and serve its brief in time to enable complainants to prepare and serve a reply brief.

Respectfully submitted,

TURNER & GERAGHTY,  
POST, AVERY & HIGGINS,  
*Solicitor for Complainants.*



United States  
Circuit Court of Appeals

For the Ninth Circuit.

WHITLA & NELSON, a Copartnership, Attorneys  
for the LANE LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

SAMUEL BOYD, Trustee in Bankruptcy of the  
LANE LUMBER COMPANY, a Corporation,  
Bankrupt, and L. C. WILSON, Receiver of  
the STATE BANK OF COMMERCE OF  
WALLACE, IDAHO,

Respondents.

In the Matter of the LANE LUMBER COMPANY,  
a Corporation, Bankrupt.

Petition for Revision  
and

Transcript of Record in Support Thereof

Under Section 24b of the Bankruptcy Act of Congress,  
Approved July 1, 1898, to Revise, in Matter of  
Law, a Certain Order of the United States  
District Court for the District of  
Idaho, Northern Division.

FILED

DEC 12 1913



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals,  
Ninth Circuit.*

In the Matter of the LANE LUMBER COMPANY,  
A Corporation,

Involuntary Bankrupt.

**Petition for Review.**

To the Honorable, the Judges of the Circuit Court  
of Appeals, Ninth Circuit, of the United  
States:

Your petitioners, Whitla & Nelson, a copartnership, attorneys for the Lane Lumber Company, a corporation, bankrupt, respectfully show:

On the 29th day of July, 1911, the above-named Lane Lumber Company, a corporation, was duly adjudged an involuntary bankrupt by the United States District Court for the District of Idaho, Northern Division.

P. H. Wall, the president of the bankrupt corporation, came to the office of Whitla & Nelson and made arrangements with the firm to represent the corporation in the bankruptcy proceedings and to prepare the schedules for the corporation, and do all acts necessary to properly represent said corporation through the proceedings.

The officers of the corporation had no means to pay the attorneys, and it was agreed between the officers of the corporation and petitioners, that petitioners were to be paid whatever amount the Court allowed them as attorneys for bankrupt; that the entire matter was to be submitted to the Court and it

was to make the allowance for the services so performed. No other payment was made for the services to said attorneys.

At the time said employment was made of the firm of Whitla & Nelson to represent the bankrupt, the bankrupt had been out of the possession of its books for several months; the corporation having been in the hands of a receiver, L. F. Connolly, who had been appointed several months previous to the adjudication of the Lane Lumber Company as bankrupt by the Honorable W. W. Woods, Judge of the District Court of the Second Judicial District of the State of Idaho. The officers of the bankrupt corporation did not know the exact status of the affairs of the corporation or in regard to the claims that were secured and unsecured and what was to go into the schedules, and it was necessary to have the books of the corporation to properly prepare the schedules. The said L. F. Connolly, receiver in the State Court, refused to turn over the books and records of the company to its officers or the attorneys, and it was necessary for said attorneys to make application to the Court for an order directing the receiver to allow them the possession of the books for the purpose of preparing the schedules. The Court granted the order for said books and they were finally obtained.

In preparing the schedules it was necessary for petitioners to examine carefully the books of said company, and about three weeks of time was consumed by the firm and its office force in preparing said schedules. In the preparation of said schedules it was necessary for Mr. Whitla, one member of said firm, to go to Spokane to interview some of the cred-

itors to find out the exact condition of their claims. The schedules covered something like one hundred pages of typewritten matter, a great part of which was description of different sections of land, and for the three weeks spent thereon and for stenographer's charges thereon, a charge of \$750.00 was made the bankrupt.

A charge of \$50 per day was made for the time actually spent in court and this fee includes the time spent in the office in going over matters with the bankrupt's officers, in conferring with the trustee for bankrupt, and in looking up authorities and preparing for the court work, and advising the officers of the corporation. Considerable time was spent by the firm in preparing papers, looking up authorities and securing facts to assist the court, but no charge was made for this during the first meeting of creditors. The charge of \$50.00 a day was for the full thirty-seven days in attendance by petitioners in court upon the specific orders of the referee in bankruptcy to attend such meetings.

A charge of \$100.00 was made for preparing proceedings, including objections and brief on objection in reference to contesting the claim of the receiver appointed by the State Court for allowance of fees and expenses to himself and attorneys.

The claim was filed by L. F. Connolly, receiver in the State Court. As receiver in the State Court he had filed a claim in the bankruptcy court for a large amount of expense, including attorney's fees, which were deemed improper on behalf of the bankrupt. Attorneys for the bankrupt, claimants herein, objected to said claim and filed their objections in writ-

ing and also made objection in open court which were concurred in by others, including Mr. Russell of Post, Avery & Higgins and the trustee. The trustee, however, did not care to urge his objections or prepare a brief and the attorneys for bankrupt, claimants herein, prepared a brief and submitted argument to the Court in the matter. The Court sustained the objections to the claim of the receiver and there was something like \$1100.00 or \$1200.00 asked for by the receiver of the State court disallowed. A charge of \$100.00 was made bankrupt for this work, about two days being spent by claimants in getting out the brief besides the time spent in arguing same.

One charge of \$25.00 and another charge of \$15.00 was made by the attorneys for bankrupt for matters connected with getting the order from the Court on L. F. Connolly, receiver in the State court, for the books of bankrupt. The services were rendered prior to the time the schedules were filed and were in regard to securing possession of the books.

The receiver in the State court at about this time also attempted to have the proceedings in the bankruptcy court stopped and the officers of bankrupt consulted with claimants in regard to this matter on several occasions. Officers of bankrupt consulted with claimants on numerous occasions and took up a great deal of their time but no further charges were ever made in regard to the advice given bankrupt's officers.

That the said first meeting of creditors continued up to the month of November, 1912. The Honorable L. L. Lewis, Referee in Bankruptcy, before



whom these proceedings were had, ordered and requested claimants, Whitla & Nelson, to attend all the hearings of said first meeting of creditors and it was upon the specific request and order of said referee that the attorneys for bankrupt, petitioners herein, attended said meetings of creditors. Petitioners at all times sought to have said first meeting of creditors end as soon as possible that they might not be compelled to make any further charges for attendance thereon, and did nothing to cause the said meeting to be continued as long as it was, and did all in their power to assist the proceedings therein. A copy of the referee's appearance docket, showing dates on which hearings were had, is hereunto attached and marked Exhibit "A-0."

That on the 11th day of December, 1912, petitioners filed a petition with the referee in bankruptcy praying for the allowance of attorney's fees to them as attorneys for said bankrupt, attached to which petition was an itemized account of their charges. Said petition and schedules are hereto attached and marked Exhibit "A." That objection to the allowance of said attorney fees to said claimants were filed by the Bank of California and Price Waterhouse and Co. (Exhibit "B"), and L. C. Wilson, receiver of the State Bank of Commerce, Wallace, Idaho (Exhibit "C"), and Samuel Boyd, Trustee (Exhibit "D"). That on the 26th day of March, 1913, said petition came regularly on for hearing before the referee in bankruptcy pursuant to an order made thereon on the 10th day of March, 1913, at which time said hearing was continued until the 9th day of April, 1913. (Said order setting the petition of claimants down

for hearing is hereto attached marked Exhibit "E").

That on the 9th day of April, 1913, said petition came regularly on to be heard, the objections all and singular to the same were overruled and petitioners directed to proceed with their proof. Whereupon, said petition and the objections thereto, the itemized fee bill attached to said petition and the proof submitted by claimants, Whitla & Nelson, were fully heard and considered by the referee in bankruptcy, and taken under advisement. (A copy of all the testimony heard at said hearing is hereto attached and marked Exhibit "F.") That on said hearing proof was submitted by claimants of attorneys of general practice on the reasonableness of their charges and proof was submitted as to the work done. None of the parties objecting to the allowance of said attorney's fees to bankrupt's attorneys appeared at said hearing, although due notice was given all creditors of said hearing and no objections were made as to the reasonableness of the charges for the services rendered.

On May 19th, 1913, the referee in bankruptcy made and filed in said matter an order allowing claimant the sum of \$2750.00 as attorney's fees for the services rendered bankrupt. A copy of said findings and order are hereto attached and marked Exhibit "G." Thereafter a petition to review was filed by L. C. Wilson, receiver of the State Bank of Commerce of Wallace, Idaho, and E. N. LaVeine, attorney for the trustee, a copy of said petition is hereto attached and marked Exhibit "H." The petition to review, together with all necessary matters was reported to the District Judge by the referee, a copy of which report

is hereto attached and marked Exhibit "I." The said petition to review came regularly on for hearing before the Honorable Frank S. Dietrich, Judge of the above-entitled District Court, at which time said matter was duly heard and considered and arguments made by the attorneys for said petitioners and respondents therein and the matter was thereupon taken under advisement by said Judge.

That thereafter and on the 7th day of July, 1913, said Judge rendered his decision revising the order of the referee in bankruptcy allowing claimants the sum of \$2750.00, and ordered that claimants be allowed only the sum of \$385.00, the same to be paid in due course of administration if there were sufficient funds available therefor, otherwise the claim was to share ratably with others of like dignity. (A copy of said decision is hereto attached and marked Exhibit "J.")

That said decision is erroneous:

1st. Because the petitioners' objecting to the allowance of said attorney fees by the referee in bankruptcy did not appear at the time said matter was set for hearing, and thereby waived their objections to said claim, and took no exception to the allowance of said claim of \$2750.

2d. Because the said sum of \$385.00 is inadequate and insufficient for the services rendered by petitioners herein.

3d. Because the following charges, which were disallowed by said District Judge, were proper charges and duly proved, to wit: August 4, 1911, advice relating to bankruptcy, proceedings instituted against Bankrupt, \$25; August 7, 1911, advice and

services relative to bankruptcy proceedings, \$15; and said decision is erroneous in holding that the evidence relating to said charges was too vague and uncertain to serve as a basis for a conclusion that they were reasonably necessary to enable the bankrupt to perform its duties or a fair value thereof.

4th. Because the charge of \$100 of August 24, 1911, for preparing papers, including objections and brief on objections and contesting receiver's claim for allowance of fees and expenses to himself and attorneys, was disallowed, and said decision is erroneous in holding that there was no legal obligation on the part of bankrupt or its attorneys to contest said allowance of receiver's claim and in holding that it was the trustee's function and his duty and also the rights of the creditors to oppose baseless claims, including said claim put forth by the receiver, and in holding that said charge of \$100 was an unnecessary charge against said estate.

5th. In holding that \$35 was a sufficient charge of the stenographer's services in preparing said schedule, and that \$15 per day was a sufficient charge for claimants to gather and classify the data from which said schedules were prepared, and that a retainer fee of \$100 for the legal advice incidental to the supervision of the work was sufficient.

6th. Because the sum of \$100 for attending the first meeting of creditors, to wit, thirty-seven days actual time in court between August, 1911, and November, 1912, is not a reasonable allowance for the services rendered, and for the reason that said amount of \$1850.00, or \$50.00 per day for the actual court attendance, is a reasonable and just charge for



the services rendered.

7th. Because said decision of said District Judge in allowing said claimants only the sum of \$385.00 is without foundation or reason, and there is no evidence upon which a disallowance or reduction of the sum of \$2,750 could be made or predicated.

8th. That said decision is unreasonable, unjust and against public policy for the reason that said decision is not supported by any sound reasoning or evidence.

WHEREFORE, petitioners, feeling aggrieved by said decision, pray that the same may be revised as to matters of law and that said claim of your petitioners herein for the sum of \$2,750 as attorney fees for services rendered bankrupt, be allowed.

Your petitioners designate E. N. LaVeine, attorney for the trustee, residence and postoffice address, Coeur de'Alene, Idaho, and James A. Wayne, attorney for the Receiver of the State Bank of Commerce, residence and postoffice address, Wallace, Idaho, as the persons upon whom your petitioners desire notice to be served.

Respectfully submitted,

WHITLA & NELSON,

Petitioners herein.

State of Idaho,

County of Kootenai,—ss.

R. S. Nelson, of lawful age, being first duly sworn, on oath, deposes and says: I am a member of the firm of Whitla & Nelson, the petitioners herein, and make this verification in their behalf. That the matters and things stated in the foregoing petition

are true to the best of my knowledge, information and belief.

R. S. NELSON.

Subscribed and sworn to before me this 2d day of October, A. D. 1913.

[Seal]

F. D. WARN,  
Notary Public.

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*In the United States Circuit Court of Appeals, Ninth Circuit.*

In the Matter of the LANE LUMBER COMPANY,  
a Corporation,

Involuntary Bankrupt.

**Acceptance of Service and Waiver of Notice of  
Filing Petition for Review.**

Service of the within petition for review is hereby accepted, and notice of the filing of the petition for review is hereby waived.

Dated this 30th day of September, A. D. 1913.

E. N. LA VEINE,  
Attorney for Samuel Boyd, Trustee of Bankrupt.

J. A. WAYNE,  
Attorney for L. C. Wilson, Receiver of State Bank  
of Commerce.

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

**IN BANKRUPTCY.**

In the Matter of the LANE LUMBER COMPANY,  
a Corporation,

Bankrupt.

**Exhibit "A"—Petition of Whitla & Nelson for Allowance of Attorneys' Fees as Bankrupt's Attorneys.**

Your petitioners respectfully state and show to this Honorable Court that heretofore the Lane Lumber Company was duly adjudged bankrupt, and thereafter in accordance with the orders of this court was required to prepare and file schedules herein, and for the purpose of so doing said bankrupt employed your petitioners, who are attorneys at law duly licensed to practice in this court and in all courts of the State of Idaho.

That after the employment of your petitioners as attorneys for the bankrupt, petitioners spent considerable time in advising said bankrupt and its officers relative to said bankruptcy proceedings, to wit, on the 4th day of August, 1911, rendered services and advice to bankrupt for which a charge of \$25.00 has been made; that on August 7th, 1911, petitioners rendered services and advice to said bankrupt for which a charge of \$15.00 has been made; that on August 12th, 1911, petitioners rendered further services and advice for which a charge of \$15.00 has been made. [1\*]

That after said Lane Lumber Company was adjudicated bankrupt and an order entered directing said bankrupt to prepare schedules of its assets and liabilities your petitioners began the work of preparing the schedules herein; that at said time Lawrence F. Connolly was receiver of the Lane Lumber Company

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\*Page-number appearing at foot of page of original certified Record.

appointed under the orders of the State court, but said receiver refused to allow bankrupt to examine its books and in every way possible hindered bankrupt and its officers in securing the necessary data with which to make said report and schedules. Thereafter bankrupt, acting through your petitioners, filed an application in this court and had an order issued directing said Lawrence F. Connolly as receiver to allow bankrupt to examine its books, and after a great deal of delay and annoyance on the part of said Connolly as receiver bankrupt was permitted by an order of this Court to have access to the books of said corporation for the purpose of preparing schedules. That thereafter your petitioners spent a large amount of time, to wit, more than two weeks of the time and services of your petitioners and use of their stenographer for all of said time *the schedules* of the affairs of said bankrupt as required by law; that the affairs of said bankrupt were in badly mixed condition and by reason of the fact that bankrupt had not been in possession of said books since about the month of May, 1911, it was very difficult to prepare said schedules, and the work of arranging the assets and liabilities in accordance with the schedules devolved wholly upon your petitioners and in preparing said schedules bankrupt was greatly handicapped by lack of information as to the exact condition of its affairs thereby causing your petitioners to expend a large amount of additional work in connection therewith; that after preparing said schedules and going over all of the [2] accounts of bankrupt, your petitioners submitted the same to this court on behalf of bankrupt, said schedules covering more



than one hundred pages of typewritten matter and having consumed more than two weeks' time to prepare, for which a charge of preparing said schedules together with the services of making application to this court to compel said Lawrence F. Connolly as receiver to allow bankrupt to examine the books, your petitioners have made a charge of \$750.00.

Your petitioners have made a further charge of \$50.00 per day for the days which they have attended bankruptcy court on the hearing of the matters in this case. Your petitioners have also made a further charge of \$100.00 for preparing the proceedings including objections and brief on the objections and contesting of the receiver's claim for allowance of fees and expenses to himself and attorney herein, and in this regard your petitioners respectfully state and show that upon the said objections being made, the bankrupt's attorneys, on behalf of bankrupt, appeared and urged said objections and more than a half day was spent in the argument of the same; that thereafter bankrupt's attorneys duly prepared, served and filed a brief herein upon said objections and contest of said Receiver's claim, with the result that improper charges amounting to about \$1500.00 made by said Receiver were disallowed and bankrupt's estate saved from having to make payment of this amount as a cost of administration, for which services your petitioners have rendered the additional charge of \$100.00.

Your petitioners state that the \$50.00 a day charge made for attending bankruptcy court one day is made to include the extra time spent by petitioners in briefing the questions involved upon each of said

hearings, going over the matters with bankrupt and investigating the facts relating to the various [3] matters that were to come up for hearing as well as the time spent in looking over the records and papers, so that in addition to the time actually charged for by your petitioners, your petitioners respectfully state that about half as much more time has in reality been spent for said bankrupt as has been charged for herein, but that the charge is made to include the extra services performed by bankrupt's attorneys.

Your petitioners attach hereto as a part of this petition an itemized statement of their charges and allege that the sum charged in each and every item is a reasonable fee therefor, and that the total sum of twenty-seven hundred fifty-five (\$2,755.00) dollars is a reasonable sum to be allowed your petitioners as attorneys' fees for the bankrupt herein.

Your petitioners further state and show that when they were employed by said bankrupt it was represented that the business of said bankrupt and assets thereof were of the sum and value of about a half million dollars, and your petitioners were compelled to and did forego other lucrative employment in accepting the matter of the attorneyship for said bankrupt, and had they not acted as attorneys for said bankrupt, they would have received other employment which would have paid them more than the amount charged for in acting as attorneys for bankrupt herein.

Your petitioners further state that the affairs of said bankrupt were in a very badly mixed condition, and that a very large amount of time was necessarily expended by petitioners in looking after the affairs

of said bankrupt and that the charge of fifty dollars per day made for the services of your petitioners is a reasonable charge for such work, and that the whole sum of \$2,755.00 charged by your petitioners is a reasonable sum to be allowed bankrupt's [4] attorneys herein.

WHEREFORE, petitioners pray that they be allowed the sum of twenty-seven hundred and fifty-five (\$2,755.00) dollars as attorneys' fees for said bankrupt's attorneys in this action, and that said sum be charged as costs of administration herein and the trustee be directed to pay to your petitioners said sum.

WHITLA & NELSON,  
Petitioners.

State of Idaho,  
County of Kootenai,—ss.

Ezra R. Whitla, being first duly sworn, deposes and says: I am one of the petitioners named in the foregoing petition and make this verification in their behalf. That I have read the foregoing petition and know the contents thereof, and that I believe the facts therein stated to be true.

EZRA R. WHITLA.

Subscribed and sworn to before me this 11 day of December, A. D. 1912.

F. D. WARN,  
Notary Public. [5]

## [Statement of Attorneys' Charges and Fees.]

THE LANE LUMBER COMPANY, Bankrupt,  
to  
WHITLA & NELSON, Dr.

1911.

Aug. 4.	Advice relating to bankruptcy proceedings instituted against bankrupt.....	\$ 25.00
Aug. 7.	Advice and services relative to bankruptcy proceedings..	15.00
Aug. 12.	Advice and services relative to bankruptcy proceedings..	15.00
	To services, preparing schedules of bankrupt and services in connection therewith, including application to court for orders upon Lawrence F. Connolly, receiver, to compel him to allow bankrupt to examine books.....	750.00
Aug. 26.	Attending meeting of creditors five days, at \$50.00 per day...	250.00
Sept. 9.	Attendance in bankruptcy court	50.00
" 27.	" " "	50.00
Oct. 10.	" " "	50.00
Oct. 23.	" " "	50.00
Nov. 13.	" " "	50.00
Dec. 5.	2 days' attendance in bankruptcy court.....	100.00
Dec. 9.	2 days' attendance in bankruptcy court.....	150



1912.

Jan. 3.	Attendance in bankruptcy court	50.00
<del>Should be Feb.</del>		
Jan. 12.	“ “ “	50.00
Feb. 20.	“ “ “	50.00
<del>Should be Feb. 24.</del>		
“ 27.	“ “ “	50.00
Apr. 10.	“ “ “	50.00
“ 16.	“ “ “	50.00

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Total fwd.....\$1855.00

[6]

Fwd.....\$1855.00

Apr. 18.	Attendance in bankruptcy court	50.00
<del>Page 888 Record.</del>		
May 2.	“ “ “	50.00
May 10.	“ “ “	50.00
May 24.	“ “ “	50.00
June 11-12.	2 days' attendance bankruptcy court.....	100.00
July 15.	Attendance in bankruptcy court	50.00
“ 16.	“ “ “	50.00
“ 26.	“ “ “	50.00
“ 27.	“ “ “	50.00
Aug. 16.	“ “ “	50.00
Aug. 24.	Preparing proceedings, including objections and brief on objections and contesting receiver's claim for allowance of fees and expenses to himself and attorney fees.....	100.00
Sept. 26.	Attendance in bankruptcy court	50.00

Oct	14-15.	2 days' attendance in bank-	
		ruptcy court.....	100.00
Oct.	22.	Attendance in bankruptcy court	50.00
Nov.	25.	Attendance in bankruptcy court	50.00
Total.....			\$2755.00

Besides the total attendance in court in the above matters, a large amount of time was spent in briefing up the various matters set for hearing, going over accounts, records, etc., with bankrupt's officers and generally looking after bankrupt's interests in these proceedings, so that the time actually spent in looking after bankrupt's business in the above estate was about fifty per cent more than shown above.

Filed June 5, 1913. A. L. Richardson, Clerk. [7]

[**Exhibit "B"—Objections of Bank of California et al. to Allowance of Attorneys' Fees.**]

*In the District Court of the United States for the District of Idaho, Northern Division.*

**IN BANKRUPTCY.**

In the Matter of the **LANE LUMBER COMPANY,**  
Limited, a Corporation, Bankrupt.

Comes now the Bank of California and Price Waterhouse & Company, creditors of the above-named bankrupt, in the above-entitled proceeding by their attorneys and Post, Avery & Higgins, a creditor of the above-named bankrupt in said proceedings and object to the allowance of attorneys' fees for Whitla & Nelson, as attorneys for the bankrupt in the above-entitled matter, or any attorneys' fees to Whitla &

Nelson, as attorneys for the bankrupt, on the grounds and for the reasons that the fees claimed by said Whitla & Nelson, as attorneys for the bankrupt in the above-entitled proceeding, are excessive, exorbitant and unreasonable.

The undersigned creditors hereby join in the objections of L. C. Wilson, Receiver of the State Bank of Commerce of Wallace, Idaho, a creditor of the above-named bankrupt, to the allowance of such fees, which objections have heretofore been filed herein, and adopt said objections as a part of the objections of the undersigned to the allowance of attorneys' fees for the attorneys for the bankrupt as fully and to all intents and purposes as if said objections were herein again particularly set forth.

WHEREFORE, the undersigned creditors ask that the prayer of the petition of Whitla & Nelson, to be allowed attorneys' [8] fees as attorneys for the bankrupt in the above-entitled proceeding, be not granted, and that no attorneys' fees be allowed said attorneys as attorneys for the bankrupt in the above entitled proceeding.

BANK OF CALIFORNIA.

By POST, AVERY & HIGGINS,

Its Attorneys.

PRICE WATERHOUSE & COMPANY.

By POST, AVERY & HIGGINS,

Its Attorneys.

POST, AVERY & HIGGINS.

Filed June 5, 1913. A. L. Richardson, Clerk. [9]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

In the Matter of the Estate of LANE LUMBER  
COMPANY, Limited, a Corporation, Bank-  
rupt.

**Exhibit "C"—Objections of L. C. Wilson to the  
Claim of Whitla & Nelson.**

Comes now L. C. Wilson, Receiver of the State  
Bank of Commerce of Wallace, Idaho, and objects  
and protests against the allowance of the claim of  
Whitla & Nelson filed herein on the 11th day of  
December, 1912, or any part thereof for the follow-  
ing reasons and upon the following grounds, to wit:

I.

That said claim is exorbitant.

II.

That many of the items in said claim are not  
proper charges against the estate of the bankrupt.

III.

That it is disclosed by the records in this case that  
the services pretended to have been performed as  
attorneys for said bankrupt and now sought to be  
made a charge against said estate, were in fact per-  
formed in attempting to conceal from the trustee in  
bankruptcy matters in connection with said estate  
and to hinder and delay the creditors of said bank-  
rupt in subjecting the assets of the said bankrupt to  
the satisfaction of their claims.

IV.

That the first three items set forth in the itemized



account attached to said claim are not proper charges against the estate of the bankrupt, and said statement does not disclose upon what [10] matters said advice was given to said bankrupt.

V.

That the item of \$750 for preparing schedules of the said bankrupt is not a proper charge against the estate of said bankrupt and is in fact a fee pretended to be charged for performing services which could have been and should have been performed by the bankrupt himself without compensation, and further that the said item is exorbitant.

VI.

That the several charges in said itemized statement of \$50 per day for attending meetings of the creditors is exorbitant, and that none of said items are proper charges against this estate; that said services were not necessarily rendered in the interest of said bankrupt estate or in the interest of said bankrupt.

Dated at Coeur d'Alene, Idaho, this 5th day of April, A. D. 1913.

L. C. WILSON,

Receiver of the State Bank of Commerce of Wallace,  
Idaho.

JAMES A. WAYNE,

Attorney for Said Receiver, Residence and P. O.  
Address, Wallace, Idaho.

Filed June 5, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,  
LIMITED, a Corporation,  
Involuntary Bankrupt.

**Exhibit "E"—Order Fixing General Hearing.**

WHEREAS, a number of petitions have heretofore been filed in the above-entitled cause; and it appearing to the Court that said petitions, and each of them should be speedily heard and that a general hearing in said cause is advisable:

IT IS THEREFORE ORDERED that a hearing be, and the same is, hereby fixed for Wednesday, the 26th day of March, A. D. 1913, at ten o'clock in the forenoon of said day, at the Law Offices of the undersigned Referee in Bankruptcy, located in the Otter-son Block in the city of Coeur d'Alene, Idaho, in said District; at which said hearing the following matters will be called and considered, to wit:

Petition of H. C. Taylor; petition of appraisers for allowance of fees; petition relative to interest on insurance matters; petition of Exchange National Bank of Coeur d'Alene; petition of attorneys for bankrupt for the taxation and allowance of attorneys' fees; petition of attorneys for petitioning creditors for the taxation and allowance of attorneys' fees; motion and proposed amended and supplemental proof of claim of the Northern Trust Company et al., for the allowance of attorneys' fees, together with all objections that may be filed re-

lative to the foregoing or any of them. And in addition to the foregoing, the following matters will be submitted to creditors for their consideration, to wit: [12]

Priority of payment of accounts and bills allowed in receivership report; payment of accounts and bills contracted by trustee; the consideration of the best means to handle sale of standing timber and cut-over lands; and, such other or further matters as may properly come on to be heard at said time.

AND IT IS FURTHER ORDERED that at least ten days' notice by mail be given, forthwith, to all creditors, counsel and other persons in interest of the time and place of said hearing, according to law.

Done at Coeur d'Alene, Idaho, in said District, this 10th day of March, A. D. 1913.

LAWRENCE L. LEWIS,  
Referee in Bankruptcy.

Filed June 5, 1913. A. L. Richardson, Clerk.  
[13]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

IN BANKRUPTCY.

In the Matter of the LANE LUMBER COMPANY,  
a Corporation,

Involuntary Bankrupt,

**Exhibit "F"—Hearing Before Referee in  
Bankruptcy.**

At the city of Coeur d'Alene, county of Kootenai and State of Idaho, in said District, before Lawrence

L. Lewis, Referee in Bankruptcy, on the 9th day of April, A. D. 1913, at 10 o'clock A. M.

This cause came regularly on for hearing pursuant to an order made and entered herein on the 26th day of March, 1913, for the purpose of considering the question relative to the attorneys' fees and no other purpose, and the parties in interest having due notice, bankrupt appearing by its attorneys Whitla & Nelson, petitioning creditors appearing by its attorneys Reed & Boughton, Carnegie Trust Co., appearing by Ernest E. Sargent, and no other or further appearances being made, the following proceedings were had, to wit:

The COURT.—The matter of attorneys' fees or petition relative to attorneys' fees in the case of Northern Trust Co. will be decided upon the briefs and upon the pleadings as it involves only questions of law.

The first objection submitted relative to the allowance of attorneys' fees with reference to Reed & Boughton, attorneys for petitioning creditors, is hereby sustained and all other and further objections are overruled, without prejudice however to Reed & Boughton attorneys for petitioning creditors, and leave is hereby granted to file [14] an itemized fee bill which shall be considered as supplemental to their affidavits and petitions now on file in this court. The time granted in which to file said fee bill is limited to and including the 14th day of April, 1913.

The objections all and singular filed herein to the petition of Whitla & Nelson for attorneys' fees



(Testimony of Lawrence M. Larson.)

for attorneys for bankrupt are hereby overruled and said petitioners directed to proceed with their proof:

Mr. Whitla, we shall now proceed to the consideration of your petition.

**[Testimony of Lawrence M. Larson.]**

LAWRENCE M. LARSON was called as a witness and being duly sworn on examination testified as follows:

(Examination by Mr. WHITLA.)

Q. Mr. Larson, you are the official stenographer of this bankruptcy court, are you?

A. Yes, sir.

Q. Mr. Larson, you have seen the schedules filed in this action by the bankrupt, comprising about 100 pages of typewritten matter, have you?

A. I have.

Q. From your experience as a stenographer, Mr. Larson, I ask you to look at that schedule, taking into consideration the fact it contains a large number of pages of description of real estate and tabulated figures, and state to the Court whether a reasonable stenographer's fee for getting out that schedule would be about \$100.00.

A. In answer to that I would say that the average amount received for ordinary matter, testimony in cases and that is sixty cents a page, and this schedule having [15] quite a lot of descriptions of property and tabulated work, is very much harder and slower work than ordinary typewritten matter and is worth more, I should say that \$75.00 to \$100.00 would be what I consider a reasonable pay for get-

(Testimony of Lawrence M. Larson.)

ting out that work.

Q. And work like is in this schedule comprising a large amount of single space work and descriptive work, descriptive work of that kind and compilation of figures is very much harder to do and is very much slower work and worth considerable more a page is it not Mr. Larson?

A. Yes, it is a good deal harder, it is good deal more difficult work than ordinary reporting.

Q. In your estimation from that schedule, what would you say Mr. Larson would be a reasonable fee for getting out the original schedule with the copies required for bankruptcy court?

A. Well, if I was getting that out and charged at the rate I have been getting I wouldn't get that out for less than \$75.00 to \$100.00.

Witness excused.

**[Testimony of Ezra R. Whitla.]**

EZRA R. WHITLA, being duly sworn, on examination testified as follows:

(Examination by Mr. NELSON.)

Mr. WHITLA.—My name is Ezra R. Whitla, occupation attorney, have been practicing in the State of Idaho about ten years and have practiced in Federal courts of this State as well as all the State courts.

Q. You have had considerable practice in the bankruptcy court, have you?

A. Yes, I have had considerable experience in bankruptcy matters. I think Mr. Lewis will take judicial [16] notice of that.

Q. The arrangements made with the bankrupt and

(Testimony of Ezra R. Whitla.)

with the firm of Whitla and Nelson were made by you were they?     A. They were.

Q. What arrangement in regard to fees was made with the bankrupt when they first came to the firm of Whitla and Nelson?

A. Bankrupt at that time had no money at all, and in fact the corporation itself was in the hands of a receiver and the officers of the bankrupt were not in charge of it, they had no money with which to pay attorneys, and the arrangements were that whatever the Court allowed the bankrupt's attorneys in the matter was to be taken by us as our fee in that matter, the whole matter was to be submitted to the Court for the services so performed and the Court was to make an allowance, whatever it deemed reasonable for our services performed for bankrupt in this case.

Q. State whether or not the firm of Whitla & Nelson have been paid anything by the bankrupt for any service rendered in this case.

A. Have not been paid any sum whatever.

Q. State to the Court in a general way what work was necessary to be done in preparing the schedule.

A. In preparing the schedule, bankrupt had been out of the possession for the books for several months and the books had been gone over by the receiver in the State Court, and they were in very bad condition to get the exact state of facts out of; bankrupt's officers themselves didn't know the exact state of facts, and it was to find out from them from the books what claims were secured and [17] what was to go in

(Testimony of Ezra R. Whitla.)

one schedule and what was not. It was a difficult job and took us several weeks going over the schedules to get the schedules out, and prior to that time Connolly, as receiver of the State court, refused to give us the books and records so that we could find out the facts, and it became necessary for us to do that to make an application to the Court for an order directing Connolly to allow us possession of the books, and Court granted it, and it was only by getting an order that we were able to get the books and data to make the schedules, and also prior to the time we began this, Connolly tried to make an agreement with some of the creditors to abrogate the bankruptcy proceedings and have it set aside, and question came up to see what was proper for them to do, whether to join with Connolly or oppose him, and I took more than half a day going over the condition of affairs of the company with its officers, and advised them that under the conditions that existed that I didn't think it was proper for them to join with Connolly in objecting to the bankruptcy proceedings; that under the law they had committed an act of bankruptcy and there was nothing for them to do but let the bankruptcy proceeding take its course.

Q. What charge did you make for preparing the schedules?

A. We made a charge of \$750.00, and I think it was for preparing the schedules; it took us something like two or three weeks getting the schedules out. That included, of course, stenographer's work,



(Testimony of Ezra R. Whitla.)

that all being included as a charge in the matter.

Q. During that time state whether or not all of the time of the office and all those connected with the office was [18] given to that.

A. Good part of that time took both members of the firm as well as the stenographer's work on that, and owing to the fact that bankrupt's were in such condition, we were unable to get the necessary data to tell what should go in the schedules. It necessitated the rewriting of a good part of this one and getting out another, and also necessitated us going to see the creditors to find out the conditions of their claim. I made several trips to Spokane to to see Mr. Stephens, relative to the claim of the Carnegie Trust Co., to see whether it was a note made by the Lane Lumber Co. and endorsed by others, or whether it was made by others and endorsed by the Lane Lumber Co. I got that information from Mr. Stephens, and all that information regarding that account, and I went to Post, Avery & Higgins to learn about their account, whether it was secured or not, and did quite a large amount of work.

Q. State whether or not any charge was made for traveling expenses.

A. The \$750.00 included all traveling expenses in lump sum.

Q. What charges were made by the firm for each days' attendance in court?

A. We made a charge of \$50.00 a day for the time actually expended in court, and that fee included the time spent in the office in going over authorities

(Testimony of Ezra R. Whitla.)

and going over the matters with the bankrupt's officers; in other words, no charge was made at the office for preparing the case and going over the facts in the office, but the charge of \$50.00 a day in court, included the time spent in office, and there is a good *deal time* we spent in office preparing papers and looking up authorities and facts, all included in that.

[19]

Q. I notice one charge of \$100 for preparing proceedings, including objections and brief on objections in reference to contesting referee's claims for allowance of fees and expenses to himself and attorneys, a fee of \$100.00. State what was done by the firm in that matter and what the result of the objections were.

A. In that matter the receiver had filed a bill for a large amount of expenses, including attorneys' fees which were deemed improper, and on the behalf of bankrupt we objected to that and filed our objections and made our objections in open; objections were concurred in by some others including Mr. Russell of Post, Avery & Higgins and the trustee, who did not care to get out a brief, and we got out a brief and submitted our argument to the Court in that matter, and the Court sustained our objections, and my recollection is that there was something like \$1100.00 or \$1200.00 asked by the receiver that was disallowed because of our objections and brief filed and we made a charge of \$100.00. I spent, together with Mr. Nelson, about two days' work on that brief alone.

Q. Are you acquainted, Mr. Whitla, with what reasonable charges are in such matters as this in vicinity

(Testimony of Ezra R. Whitla.)

in any bankruptcy court, for services such as were rendered by Whitla & Nelson in this matter?

A. I am.

Q. State what the reasonable charges were per day for court work such as rendered by the firm of Whitla & Nelson in this matter.

A. I think the sum of \$50.00 a day rendered was a reasonable charge for the services. [20]

Q. What about the \$100.00 for preparing that special work?

A. I think that was a reasonable charge for the work. Had I been making that for any other person or in any other court I would have charged that or more. I think that charge for the schedule was also a reasonable charge. In that regard I will say that bankrupt in every instance fully disclosed to the Court and trustee and we done everything possible to assist the trustee and creditors in learning the full information relative to this estate and there was none of these hearings that was delayed because of the bankrupt's officers or bankrupt's attorneys, because in every instance we tried to push the hearings at as early a date as we possibly could.

Q. State whether or not there were a number of conferences held with the trustee and trustee's attorney and the firm of Whitla & Nelson, in regard to assisting the trustee in this regard.

A. There was. Every time the trustee asked us or bankrupt relative to anything, we took it up and furnished him with all the information he desired so far as we were able to do so, and in none of these proceedings was there any charge for work done for

(Testimony of Ezra R. Whitla.)

the benefit of the trustee or the bankrupts personally.

Q. State whether or not you included in any of these charges any work done for P. H. Wall or any other person individually other than connected with the bankruptcy matter.

A. Nothing whatever. This was strictly for preparing the schedules and attending the examinations and assisting the creditors and trustee in this estate. [21]

**[Testimony of Robert H. Elder.]**

ROBERT H. ELDER, called as a witness, being duly sworn, on examination testified as follows:

(Examination by Mr. WHITLA.)

Q. Mr. Elder, you are an attorney at law licensed to practice in all courts, both State and Federal in Idaho? A. I am.

Q. Are you acquainted with the reasonable attorneys' fees in this court and other courts?

A. I think I am.

Q. State to the Court, Mr. Elder, what is the fact as to whether or not a charge of \$50.00 a day for time spent for attending court is in your opinion a reasonable charge for such services?

A. Why, as a usual thing, I should say yes that was reasonable charge, I think it might depend somewhat upon the amount involved and work done.

Q. In a case involving as much money and as many questions as you know arise in the Lane Lumber Co. matter, state whether or not you would consider \$50.00 a day a reasonable charge for appearing in that matter.



(Testimony of Robert H. Elder.)

A. I should think that was, as I remember that there was something like several hundred thousand dollars involved.

Q. In considering Mr. Elder that that charge for the time spent in court also included the work done in the office in preparing the case, looking up authorities and going over the matter with the clients, and that no charge was made for that time, that that time was included in the time spent in court, would you consider \$50.00 a day reasonable?

A. I would think that very reasonable. [22]

Q. And considering the schedules, Mr. Elder, where it takes two or three weeks to prepare the schedules, the schedules themselves running something like one hundred pages of typewritten matter, and much of which is tabulated matter and descriptive matter, I ask you to state to the Court whether or not you would consider \$750.00 a reasonable charge for preparing the schedules.

A. I would think it was.

Witness excused.

**[Testimony of R. L. Black.]**

R. L. BLACK, a witness being called and duly sworn, on examination testified as follows:

(Examination by Mr. WHITLA.)

Q. Mr. Black, you are an attorney duly licensed to practice in all the courts in this State and the Federal Courts. A. I am.

Q. I will ask you to state, Mr. Black, whether or not you would consider a charge of \$50.00 a day for time actually spent in court to be reasonable charge, especially when that included the time spent in the

(Testimony of R. L. Black.)

office in preparing the case and going over the matter with clients.

A. I consider in a case of this kind of this importance, and the amount involved and responsibility, that a charge of \$50.00 a day for time actually expended is a very reasonable charge for actual court work.

Witness excused.

**[Testimony (Further) of Ezra R. Whitla.]**

Mr. WHITLA again takes witness-stand:

Mr. WHITLA.—In regard to the attendance of the court on behalf of bankrupt's attorneys, the referee explicitly [23] asks us to attend all hearings, on account of the important matters involved wished bankrupt and his attorneys to be present at all hearings and that charge we made, we attended by request of referee. And in regard to the advice for which we charged \$25.00 in one instance and \$15.00 (\$15.00) in two other instances, these were matters connected with the Connolly receivership after the bankruptcy proceedings had been instituted and prior to the time schedules were filed or application made to the Court for an order, it was relative to getting possession of the books, so that we could decide certain matters and things, and in connection with that I can't say at this time in detail what they were, but I made the charge at the time services were performed and I considered them reasonable at the time. I will state further that in every instance bankrupt has answered all questions that have been asked, excepting in one instance after he had been

(Testimony of Ezra R. Whitla.)

arrested on fifteen charges preferred by the trustee and some of which were pending, at one examination some questions were asked and we objected to bankrupt answering that until the cases were settled in the State Court, and made the statement in court that as soon as these cases were settled that we would again give them all information relative to the questions asked us. The charges in this matter do not cover any charge made against P. H. Wall for services rendered in the criminal cases.

(Mr. NELSON examines witness.)

Q. Who has paid that, P. H. Wall?

A. He has paid all except the one in Shoshone county.

The COURT.—Q. That is, all charges included in your fee bill, Mr. [24] Whitla, were charges for work done exclusively with reference to these bankruptcy proceedings?

A. Exclusively with reference to these bankruptcy proceedings and also exclusively with reference to getting out the schedules and preparing for and attending the examinations for the purpose of furnishing the Court and creditors information relative to the bankruptcy proceedings.

Q. State whether or not *its* ever been the intention or act of attorneys to prolong this first meeting of creditors.

A. It has not. Bankrupt and his attorneys have been anxious for some time to get the first meeting of creditors closed for two reasons,—first, the officers themselves wanted to be excused from further attendances in court, because they wanted to be allowed

(Testimony of Ezra R. Whitla.)

to attend to their own personal matters and they wanted to be excused to save further expense, and I took that up at one time and asked all persons that desired any further examination of the bankrupts to present any matters they had at an early date so that first meeting could be closed, and I will say further that I took the matter of my attorneys' fees up with Post, Avery & Higgins and Mr. Russell, and they said they had no objection to it and that they considered it reasonable. At the same time I talked the matter over with Mr. Russell, I told him I would like to have matter closed, told him we were making a charge of so much a day and while we could collect so long as it ran I didn't want it prolonged. I have never attempted to prolong it, but, on the other hand, have tried to curtail the expenses for the estate.

**[Testimony of R. S. Nelson.]**

R. S. NELSON, called as a witness, being [25] duly sworn, on examination testified as follows:

(Examination by Mr. WHITLA.)

Q. Mr. Nelson, you are one of the members of the firm of Whitla & Nelson, are you? A. I am.

Q. You are acquainted with the bill we have filed in the matter of the Lane Lumber Co. bankrupt?

A. Yes, sir.

Q. State what's the fact whether or not,—first state about the time that we were engaged in preparing the schedules in this matter.

A. About three weeks.

Q. What's the fact as to whether or not you consider a charge of \$750.00 made to be a reasonable fee?

A. I think it is small enough; it is very reasonable.



(Testimony of R. S. Nelson.)

Q. Now, the charge of \$50.00 a day that we have made for the attendance in the bankruptcy court, state whether or not in your opinion that is a reasonable fee for these services.

A. Yes, sir, it is.

Q. And that one member of the firm at least attended court for all the charges we have made?

A. Yes, sir.

Q. This does not include any time spent in looking up authorities in office or going over the case with clients?      A. No, sir.

Q. State whether or not that is the regular and ordinary charge of the firm when we perform services by the day, \$50.00 a day.      [26]

A. Yes, sir.

Q. That is what is paid in other cases when we work by the day?      A. Yes, sir.

Q. Now, in matters involved in this case including objections by the bankrupt himself to a large number of claims that was filed on behalf of Lawrence Connolly—      A. Yes, sir.

Q. And the bankrupt did object to a large number of claims and successfully sustained that objection?

A. Yes, sir.

Q. And also to a large number of items asked by Connolly as a priority claim in his administration?

A. Yes, sir.

Q. And the bankrupt, acting through the attorneys, at all times assisted the trustee and creditors in getting any information or any information relative to the estate of bankrupt?

A. Yes, we at all times assisted them in every

(Testimony of R. S. Nelson.)

manner we knew how. We were always very willing to assist the trustee and creditors, and to get any information wanted for the benefit of creditors.

Q. State whether or not the attorneys of bankrupt also secured for the trustee after these proceedings were instituted and bankrupt was declared bankrupt deeds to several tracts of land which they had never secured title to prior to that time.

A. Yes, sir.

Q. This included several deeds from P. H. Wall of lands that belonged to him. A. Yes, sir. [27]

Q. And no part of our fee has ever been paid?

A. None of it at all.

Q. And there is at the present time due the reasonable fee \$2,755.00 now due the firm of Whitla & Nelson for services performed in that matter?

A. Yes, sir.

Q. State whether or not bankrupt has in every way possible tried to curtail the expenses in this matter. A. Yes, sir, we have.

Q. State whether or not bankrupt has also requested the creditors and trustee to close the first meeting of creditors and the bankrupt's examination at as early a date as possible?

A. Yes, we tried to get it released some time ago and never tried to prolong the matter in any way.

Witness excused.

Mr. WHITLA.—I understand the hearing on our bill is closed?

The COURT.—Yes, for the purpose of taking the proof relative to the attorneys' fees of bankrupt's attorneys is closed.

The COURT.—There being nothing further to come before the court at this time, a further continuance is taken until April 15, 1913, at 10 o'clock A. M.

Filed June 5, 1913. A. L. Richardson, Clerk.  
[28]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,  
Bankrupt.

**Exhibit "G"—Order [of Referee in Bankruptcy  
Allowing Certain Attorneys' Fees, etc.].**

This matter having come regularly on for hearing on the 9th day of April, A. D. 1913, at 10 A. M. by order of the Court duly made herein upon the objections of L. C. Wilson, Receiver of the State Bank of Commerce, Bank of California, and Price Waterhouse and Post, Avery & Higgins. The petitioners, Whitla & Nelson, appeared in person with their witnesses but the objecting creditors did not appear and were not represented, although the Court finds that they had due notice of said hearing but failed to enter any appearance whatever. The petitioning creditors also appeared by their attorneys, Reed & Boughton, and the Carnegie Trust Company appeared by its attorneys H. M. Stephens and Ernest E. Sargent; thereupon the Court overruled said objections as to their legal questions involved and proceeded to hear the petition of bankrupt for the allowance of the attorneys' fees upon the merits. Thereupon Ezra R. Whitla, R. S. Nelson, R. H. Elder and R. L. Black were duly called, sworn and examined, and the Court,

after having heard said matters and being well and fully advised in the law and premises, finds that the petitioning attorneys performed services for the bankrupt after the petition for bankruptcy had been filed on the 4th day of August, 1911, for which a charge of \$25.00 was made, and which said services were reasonable; that on the 7th day of August, 1911, said attorneys also performed services for said bankrupt for which a charge of \$15.00 was made, and on the 12th day of August, 1911, the said attorneys rendered further services for which a charge of \$15.00 was made, all of which said [29] sums were reasonable. That thereafter said attorneys for bankrupt prepared and filed the schedules, which said schedules covered a typewritten report of more than one hundred pages, and the preparing of which said schedule employed more than two weeks of the time of the firm of Whitla & Nelson, together with the use of their stenographer in preparing said schedules. The Court finds in this regard that by reason of the condition of the affairs of said bankrupt and by reason of the further fact that bankrupt had not had its books since the month of May 1911, that it was very difficult to prepare said schedules of its assets and liabilities as required by the laws, and it was necessary that attorneys be employed to perform said services and that the same were not merely of a clerical nature; that it also became necessary for the attorneys for bankrupt to, and said attorneys for bankrupt did, file a petition in this court to compel Lawrence F. Connolly, as receiver in the state court, to allow the bankrupt and its attorneys to examine bankrupt's books in order that such schedules could



be filed, and such order was duly made herein and the Court finds that the attorneys for bankrupt have made a charge of \$750.00 for said preliminary work in preparing said schedules and filing the same as required by law, and that said sum was a reasonable charge.

The Court further finds that the bankrupt's attorneys also filed objections to the allowance of certain claims of L. F. Connolly as receiver on the ground that said claims were not proper claims against said estate, and upon said objections being heard the attorneys for bankrupt urged said objections and also filed a brief in support thereof, and that by reason of said services a large amount of charges made by said receiver amounting to more than \$1,000.00 were disallowed, and for which said services bankrupt's attorneys have made a charge of \$100.00 which the court finds was and is a reasonable charge. [30]

The Court further finds that said bankrupt's attorneys appeared and took part in the hearings in this case thirty-seven days, and that all of said time was necessarily employed by said attorneys, and that in addition to said time said attorneys also spent a large amount of time and labor in advisory services with said bankrupt, and in preparing authorities upon the various questions involved and the attendance of said bankrupt's attorneys in court in all of said days was under the direction and order of this court. The Court further finds that for these services said attorneys have made a charge of \$50.00 per day for the time actually spent in court, and no extra charge has been made for the extra advisory

services and research and preparation made by said attorneys, and the Court finds that said charge was and is a reasonable charge for said services, and that bankrupt's attorneys are entitled thereto, and that said services in all amount to the sum of \$2,755.00, which said sum was and is a reasonable charge and allowance to be made to bankrupt's attorneys for the services performed herein.

NOW, THEREFORE, it is hereby ordered that the firm of Whitla & Nelson, a copartnership comprised of Ezra R. Whitla and R. S. Nelson, be and they hereby are allowed the sum of Twenty-seven Hundred and Fifty-five (\$2755.00) Dollars as fees for their services as attorneys for the Lane Lumber Company, Bankrupt, and it is further ordered that said charge be paid as costs of administration herein as required by the act of bankruptcy, and that the trustee be and he hereby is authorized, empowered and directed to make payment of said sum whenever he shall have sufficient funds from which said claim can be paid.

Dated this 19 day of May, A. D. 1913.

LAWRENCE L. LEWIS,

Referee in Bankruptcy.

Filed June 5, 1913, A. L. Richardson, Clerk. [31]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Copy.

#449.

In the Matter of the LANE LUMBER COMPANY,  
Limited, a Corporation,

Involuntary Bankrupt.

**Exhibit "H"—Petition to Review Referee's Order  
Allowing Whitla & Nelson, Attorneys for  
Bankrupt, \$2755.**

To the Honorable LAWRENCE L. LEWIS,  
Referee in Bankruptcy.

Your petitioners respectfully show:

That the undersigned, L. C. Wilson, is the duly appointed, qualified and acting receiver of the State Bank of Commerce, a corporation, of Wallace, Idaho, a claimant herein; that he is the same L. C. Wilson that filed objections to the above referred to claim of Whitla & Nelson; that the said Bank of Commerce has caused to be filed and allowed in this proceeding its claim against bankrupt;

That Samuel L. Boyd, is the duly elected, qualified and acting trustee of the bankrupt; that he has authorized his attorney, E. N. LaVeine, to file this petition for and on his behalf as trustee of this estate;

That on December 11, 1912, Whitla & Nelson, attorneys for the bankrupt herein, filed their petition praying for the allowance of Two Thousand Seven Hundred Fifty-five (\$2755) Dollars, as attorneys for the bankrupt herein; that thereafter objections to the allowance of said claim were filed by your peti-

tioner, L. C. Wilson, and others; that thereafter the hearing was had thereon, after notice to the various attorneys representing creditors in this estate had been given; that thereafter on the 19th day of May, 1913, the referee made and entered an order herein, allowing said firm of Whitla & Nelson the sum of Two Thousand Seven Hundred Fifty-five (\$2755) Dollars, as attorney's fees for their services as attorneys for the bankrupt herein, a copy of which [32] is hereto attached, made a part hereof and marked Exhibit "A";

That such order was and is erroneous in that:

1. That the finding of the referee that the bankrupt's attorneys performed services for the bankrupt on August 4th, 1911, for which a charge of Twenty-five (\$25) Dollars, was made, and the finding that said services were reasonable, is not founded upon any evidence showing or tending to show that said services were rendered while performing any duties, as attorneys for the officers of the bankrupt, as prescribed by the Bankruptcy Act.

2. That the finding of the referee that the bankrupt's attorneys performed services for the bankrupt, on the 7th day of August, 1911, and the 12th day of August, 1911, for which a charge of Fifteen (\$15) Dollars was made on each day, and the finding that the services were reasonable, is not founded upon any evidence showing or tending to show that said services were rendered while performing any duties, as attorneys for the bankrupt, as prescribed by the Bankruptcy Act;

3. That the finding of the referee that the bankrupt's attorneys prepared schedules covering a type-



written report of more than one hundred pages, is contrary to the original thereof, filed herein; that the finding of the referee that the services rendered by the bankrupt's attorneys in preparing said schedule was not merely of a clerical nature, is contrary to the record and to law;

That the amount allowed by the Court, Seven Hundred Fifty (\$750) Dollars, is excessive for the preparation of said schedule either by bankrupt or its attorneys;

That the allowance of the said amount of said Seven Hundred Fifty (\$750) is for the services of two attorneys and a stenographer for two weeks without any showing, by the attorneys for the bankrupt, as to whether all the said time or only a portion was consumed in the preparation thereof. [33]

4. That the finding of the referee that it became necessary for the bankrupt's attorneys to, and said attorneys did, file a petition in this court to compel Lawrence F. Connolly, as receiver in the State Court to allow the officers of the bankrupt and its attorneys to examine the bankrupt's books in order that such schedule could be filed, misrepresents the true condition with reference to said matter for the records herein disclose that from the 29th day of July, 1911, to the 25th day of September, 1911, said Lawrence F. Connolly was receiver in this Federal Court, in this proceeding, subject to its jurisdiction.

That the records disclose that said Lawrence F. Connolly was discharged as receiver in the said Court, on August 3, 1911, nineteen days before the bankrupt filed its schedule herein.

5. That the objections filed by the attorneys for the bankrupt for the allowance of certain claims of Lawrence F. Connolly, as receiver, was not a legal service required of the attorneys for the bankrupt under the Bankruptcy Act, and the charge for said services is not an obligation chargeable against this estate;

6. That the record in this proceeding shows that the attorneys for the bankrupt did not appear and take part in the hearings in this proceeding thirty-seven days; that on the following dates, for which Fifty (\$50) Dollars per day was allowed, no hearing or meeting of creditors was had and no appearance made by said attorneys on behalf of said bankrupt, to wit:

August 26, 1911.....	5 days;
October 10, 1911.....	1 day;
January 12, 1911 .....	1 day;
February 27, 1912 .....	1 day.
May 2, 1912 .....	1 day;
July 16, 1912 .....	1 day;
November 25, 1912 .....	1 day;

---

Total            11 days.

That the meeting on April 16th, 1912, Record p. 878, adjourned immediately after court convened;

That the meeting on April 18, 1912, Record p. 879, continued for a half day only;

That the meeting on August 16, 1912, Record p. 1286, dealt with the allowance of claims; [34]

That the services under date of August 24th, 1912, in bankrupt's attorneys petition, in the sum of One Hundred (\$100) Dollars, is not chargeable against

the estate under the Bankruptcy Act;

7. That the said order of the referee in allowing the petition of the attorneys for the bankrupt, in the sum prayed for, to wit, Two Thousand Seven Hundred Fifty-five (\$2,755) Dollars, is an excessive and an exorbitant amount for the services rendered taxable under the Bankruptcy Act;

8. That the referee has made and included in said allowance of Two Thousand Seven Hundred Fifty-five (\$2,755) Dollars, services alleged to have been rendered, the fees for which are not chargeable against this estate under the Bankruptcy Act;

9. That at the time of said allowance the trustee had no money on hand with which to pay said amount;

10. That at said time Fifteen Thousand Six Hundred Four and 33/100 (\$15,604.33) Dollars, incurred by the receiver and passed to the trustee for payment, was due and payable under the orders of this Court;

11. That at the time of making said order allowing said sum of Two Thousand Seven Hundred Fifty-five (\$2,755) Dollars, there was due and payable to the First National Bank of Harrison, as a secured claim, the sum of Seven Thousand Forty-four and 16/100 (\$7,440.16) Dollars;

12. That at the time of making said order there was no way of ascertaining the amount the trustee would have on hand to pay the indebtedness of the estate, nor was there any way of ascertaining the amount which he would have to distribute to the creditors.

WHEREFORE, your petitioners, feeling aggrieved because of such order, pray that the same

may be reviewed, as provided in the Bankruptcy Act of 1898, the amendments and General Order XXVII.

[35]

L. C. WILSON,

Receiver of the State Bank of Commerce, a Corporation.

JAMES A. WAYNE,

Attorney for L. C. Wilson, Receiver.

E. N. La VEINE,

Attorney for Samuel L. Boyd, Trustee of the Lane Lumber Company, Limited, a Corporation, Bankrupt.

Dated May 28, 1913.

State of Idaho,

County of Kootenai,—ss.

L. C. Wilson, the receiver of the State Bank of Commerce, a corporation, and one of the petitioners mentioned and described in the foregoing petition, does hereby make solemn oath that the statements contained in the foregoing petition are true according to the best of his knowledge, information and belief.

L. C. WILSON,

Receiver of the State Bank of Commerce, a Corporation.

Subscribed and sworn to before me this 28th day of May, 1913.

W. F. McNAUGHTON,

Notary Public. [36]

State of Idaho,

County of Kootenai,—ss.

E. N. LaVeine, being first duly sworn, deposes and



says: That Samuel L. Boyd, trustee herein, is without the State of Idaho, and is not able to make this verification personally; that he has instructed this affiant, as his attorney to sign and file the foregoing petition; the affiant does hereby make solemn oath that the statements contained in the foregoing petition are true according to the best of his knowledge, information and belief.

[Seal]

E. N. LA VEINE,

Attorney for Samuel L. Boyd, Trustee of the Land Lumber Company, Limited, a Corporation, Bankrupt.

Subscribed and sworn to before me this 28th day of May, 1913.

W. F. McNAUGHTON,

Notary Public.

Filed June 5, 1913. A. L. Richardson, Clerk.

[37]

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*In the District Court of the United States for the District of Idaho, Northern Division.*

IN BANKRUPTCY—No. 449.

In the Matter of the LANE LUMBER COMPANY,  
Limited, a Corporation,

Involuntary Bankrupt.

**Exhibit "I"—Report of Referee in Bankruptcy on  
an Order Allowing Attorney's Fees of Bankrupt.**

To the Honorable FRANK S. DIETRICH, District  
Judge:

I, LAWRENCE L. LEWIS, Referee in Bankruptcy, in charge of the above-entitled proceedings, do hereby certify:

## 1.

That in the course of said proceedings on, to wit, the 19th day of May, A. D. 1913, an order was made and filed herein allowing to Whitla & Nelson, attorneys for said bankrupt, attorneys' fees, in the sum of Twenty-seven Hundred and Fifty-five (\$2755.00) Dollars.

## 2.

That thereafter on, to wit, the 28th day of May, 1913, L. C. Wilson, receiver of the State Bank of Commerce (a creditor herein), by and through his attorney, James A. Wayne, and E. N. La Veine, attorney for Samuel L. Boyd, trustee of the above-entitled estate, feeling aggrieved thereat, filed herein their petition for review, which said petition was duly granted.

## 3.

That a full, true and correct summary of the proceedings upon [38] which said order was made and based is as follows, to wit:

On, to wit, the 11th day of December, 1912, the petition praying for the allowance of attorney's fees to the attorneys of the said bankrupt was duly filed herein; that thereafter on, to wit, the 26th day of March, 1913, said petition came regularly on for hearing (See RECORD OF PROCEEDINGS pages 1467 and 1468, pages 1494 to 1501, both inclusive), pursuant to an order made herein on the 10th day of March, 1913 (See DOCKET, page 57), at which said hearing a continuance was taken on all petitions relating to attorney's fees (except that of the Northern Trust Company et al., RECORD OF PROCEEDINGS, page 1502), until the 9th day of April, 1913,

at ten o'clock A. M. (See RECORD OF PROCEEDINGS, pages 1501, 1524 and 1525); that thereafter on, to wit, the 5th day of April, 1913, L. C. Wilson, receiver of the State Bank of Commerce, the Bank of California, Price Waterhouse & Company, and Post, Avery & Higgins, each and all, filed in said cause their objections to the allowance of said petition; that thereafter on, to wit, the said 9th day of April, 1913, the said petition came regularly on to be heard (See RECORD OF PROCEEDINGS, pages 1526 to 1540, both inclusive); that on the said 9th day of April, 1913, the objections, all and singular, to said petition were overruled and said petitioners directed to proceed with their proof (See RECORD OF PROCEEDINGS, page 1527); and, that thereafter the said petition, the objections thereto, the itemized "fee bill" attached to said petition and the proof submitted having been first carefully considered and the matter taken under advisement, the said order of the 19th day of May, 1913, was duly made and filed in said cause, to which said order L. C. Wilson, the said receiver; and E. N. La Veine attorney for the trustee, herein, submit that such order was and is erroneous in this:

1. "That the findings of the referee that the bankrupt's attorneys performed services for the bankrupt on August 4th, 1911, for which a charge of Twenty-five (\$25) Dollars was made and the finding that said services were reasonable, is not founded upon any evidence showing or tending to show that such services were [39] rendered while performing any duties, as attorneys, for the officers of the bankrupt, as prescribed by the Bankruptcy Act."

2. "That the findings of the referee that the bankrupt's attorneys performed services for the bankrupt on the 7th day of August, 1911, and the 12th day of August, 1911, for which a charge of Fifteen (\$15) Dollars was made on each day, and the finding that the services were reasonable, is not founded upon any evidence showing or tending to show that said services were rendered while performing any duties, as attorneys for the bankrupt, as prescribed by the Bankruptcy Act."

3. "That the findings of the referee that the bankrupt's attorneys prepared schedules covering a typewritten report of more than one hundred pages, is contrary to the original thereof, filed herewith; that the findings of the referee that the services rendered by the bankrupt's attorneys in preparing said schedule was not merely of a clerical nature, is contrary to the record and to law;

That the amount allowed by the Court, Seven Hundred Fifty (\$750) Dollars is excessive for the preparation of said schedule, either by bankrupt or its attorneys;

That the allowance of the said amount of said Seven Hundred Fifty (\$750) Dollars is for the services of two attorneys and a stenographer for two weeks without any showing, by the attorneys for the bankrupt, as to whether all the said time or only a portion was consumed in the preparation thereof."

4. "That the finding of the referee that it became necessary for the bankrupt's attorneys to, and said attorneys did, file a petition in this Court to compel Lawrence F. Connolly, as receiver in the State Court



to allow the officers of the bankrupt and its attorneys to examine the bankrupt's books in order that such schedule could be filed, misrepresents the true condition with reference to said matter for the records herein disclose that from the 29th day of July, 1911, to the 25th day of September, 1911, said Lawrence F. Connolly was receiver in this Federal Court, in this proceeding, subject to its jurisdiction;

That the records disclose that said Lawrence F. Connolly was discharged as receiver in the said Court on August 3, 1911, nineteen days before the bankrupt filed its schedule herein."

5. "That the objections filed by the attorneys for the bankrupt for the allowance of certain claims of Lawrence F. Connolly, as receiver, was not a legal service required of the attorneys for the bankrupt under the Bankruptcy Act, and the charge for said services is not an obligation chargeable against this estate."

6. "That the record of this proceeding shows that the attorneys for the bankrupt did not appear and take part in the hearings in this proceeding thirty-seven days; that on the following dates for which Fifty (\$50) Dollars per day was allowed, no hearing or meeting of creditors was had and no appearance made by said attorneys on behalf of said bankrupt, to wit:

August 26, 1911.....	5 days;
October 10th, 1911.....	1 day;
January 12th, 1911.....	1 day;
February 27th, 1912.....	1 day;

May 2, 1912.....1 day;  
July 16th, 1912.....1 day;  
November 25th, 1912.....1 day;

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Total.....11 days.

[40]

“That the meeting on April 16th, 1912, Record p. 878, adjourned immediately after court convened;

That the meeting on April 18, 1912, Record p. 879, continued for a half day only;

That the meeting on August 16, 1912, Record p. 1286, dealt with the allowance of claims;

That the services under date of August 24th, 1912, in bankrupt’s attorneys petition, in the sum of One Hundred (\$100) Dollars is not chargeable against the estate under the Bankruptcy Act.”

7. “That the said order of the Referee in allowing the petition of the attorneys for the bankrupt, in the sum prayed for, to wit, Two Thousand Seven Hundred Fifty-five (\$2755) Dollars is an excessive and an exorbitant amount for the services rendered taxable under the Bankruptcy Act.”

8. “That the referee has made and included in said allowance of Two Thousand Seven Hundred Fifty-five (\$2755) Dollars, services alleged to have been rendered, the fees for which are not chargeable against this estate under the Bankruptcy Act.”

9. “That at the time of said allowance, the trustee had no money on hand with which to pay said amount.”

10. “That at said time, Fifteen Thousand Six Hundred Four and 33/100 (\$15,604.33) Dollars, in-

curred by the receiver and passed to the trustee for payment, was due and payable under the orders of this Court.”

11. “That at the time of making said order allowing said sum of Two Thousand Seven Hundred Fifty-five (\$2755) Dollars, there was due and payable to the First National Bank of Harrison, as a secured claim, the sum of Seven Thousand Forty-four and 16/100 (\$7,440.16) Dollars.”

12. “That at the time of making said order there was no way of ascertaining the amount the trustee would have on hand to pay the indebtedness of the estate, nor was there any way of ascertaining the amount which he would have to distribute to the creditors.”

THE PRECISE QUESTION SUBMITTED to the Judge for his consideration and decision is this:

1. Is the amount allowed the attorneys for the bankrupt, herein, as attorneys’ fees in said proceedings, to wit, the sum of Twenty-seven Hundred Fifty-five (\$2755) Dollars, excessive?

I hand up herewith for the information of the Judge, the following records, papers and files, to wit:

1. Petition for Review.

2. Record of Proceedings, pages 1 to 1540, both inclusive.

3. Petition for the allowance of attorneys’ fees and fee-bill attached. [41]

4. Objections of L. C. Wilson.

5. Objections of Bank of California, Price Waterhouse & Co., and Post, Avery & Higgins.

6. Order Allowing Attorneys’ Fees of Bankrupt.

7. Referee's Docket (Certified up in Northern Trust Company, matter).

I HEREBY FURTHER CERTIFY that the above and foregoing are all the papers, records or files herein used or considered or pertaining to this review.

Done at Coeur d'Alene, Idaho, in said District, this 4th day of June, A. D. 1913.

Respectfully submitted,

LAWRENCE L. LEWIS,

Referee in Bankruptcy.

Filed June 5, 1913. A. L. Richardson, Clerk.  
[42]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,  
Bankrupt.

**Exhibit "J"—Decision on Claim of Bankrupt for  
Attorney's Fees.**

Jul. 7, 1913.

WHITLA & NELSON, Attorneys for Claimant.

E. N. LA VEINE, Attorney for Trustee.

JAMES A. WAYNE, Attorney for Objecting Creditor.

DIETRICH, District Judge.

A general creditor and the trustee, feeling aggrieved by an order of the referee allowing in full a claim of the attorneys for the bankrupt for fees aggregating \$2,750.00, have brought the matter here



upon a petition for review, in which they both join.

The respondents' objection that the order cannot be reviewed because no exception was taken at the time is not well founded in law. While the course pursued by the trustee and the objecting creditor in not appearing and resisting the claim at the hearing before the referee cannot be commended, it is thought that formal exceptions are not essential to the right of review. The general rule, with its qualifications, is correctly stated in *Collier on Bankruptcy* (Ninth Edition), page 609, where it is said:

"A referee's findings of fact may be reviewed, although no formal exceptions to his decision are filed where such filing is not required by a rule or order of the court. The court will not ordinarily consider for the first time questions not raised below, or issues not presented by the record; if a point is presented by the record the district court may consider it although it was not discussed before or by the referee. The court [43] is not barred by or confined to the matters certified by the referee; under its broad general powers it may consider any point presented by the record."

See, also, *Loveland on Bankruptcy*, Vol. I, Sections 94 and 95.

We pass to a consideration of the merits. The provision of law upon which the claimants rely is found in Section 64-b of the bankruptcy act, where it is declared that costs of administration, including "one reasonable attorney's fee, for the professional services actually rendered \* \* \* to the bankrupt in involuntary cases while performing the

duties" in the act prescribed, must be paid in preference to certain other of the indebtedness of the estate. The "duties" referred to are imposed by Section 7 of the Act, which, in so far as it is thought by the claimants to be material, is as follows:

"Sec. 7. *Duties of Bankrupt.* a. The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (8) prepare, make oath to, and file in court, within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, \* \* \* a schedule of his property showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences if known, if unknown that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9), when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate."

In considering the several items of the claim it must be borne in mind that while no objection is made because it is in the name as well as upon behalf

of the attorneys, and is not presented directly by the bankrupt itself, there is no contractual relation between claimants and the court or the estate; they were employed not by the trustee but by the bankrupt. For any service rendered to and accepted by the bankrupt it is doubtless liable, but here we [44] are concerned only with the liability of the estate, and its liability is limited to a reasonable compensation for such services, and no others, as fall within the terms of the statute. In *re Connell & Sons*, 120 Fed. 846. To warrant any allowance therefor it must first appear not only that services were rendered and were valuable; but that the conditions were such that by operation of law an obligation to pay therefor is imposed upon the estate. The inquiry here, therefore, has three branches: Was a service performed? Was such service reasonably necessary to enable the bankrupt to discharge its duties under the law? And what was it reasonably worth? The burden is upon the claimants to make a *prima facie* showing upon each of these three heads.

The first items in the account are as follows:

“1911.

Aug. 4. Advice relating to bankruptcy  
proceedings instituted against  
the bankrupt .....\$25.00

Aug. 7. Advice and services relative to  
bankruptcy proceedings.....\$15.00

Aug. 12. Advice and services relative to  
bankruptcy proceedings .....\$15.00.”

The adjudication was made upon August 1, 1911,

and to what the advice and service here charged for pertained is by the statement of account left wholly to conjecture. The only evidence pertaining to the items is the testimony of one of the claimants, as follows:

“And in regard to the advice for which we charged \$25.00 in one instance, and \$15.00 in two other instances, these were matters connected with the Connolly receivership after the bankruptcy proceedings had been instituted and prior to the time schedules were filed or application made to the court for an order. It was relative to getting possession of the books so that we could decide certain matters and things, and in connection with that I can't say at this time in detail what they were, but I made the charge at the time the services were performed, and I considered them reasonable at the time.”

But this evidence is altogether too vague and uncertain to serve as the basis for a conclusion that the services were reasonably necessary to enable the bankrupt to perform its duties, or a finding of the value thereof. In the most favorable view the testimony may be construed as suggesting, not showing, that the advice may have [45] related to the preparation of the requisite schedules; but for all services connected with that duty a distinct charge of \$750.00 is made, which charge, it is to be inferred from the testimony, was also intended to cover the proceedings to secure possession of the bankrupt's books and papers from the receiver. It is therefore held that the showing was insufficient to warrant the referee in allowing any one of the three items.



We next consider the following charge: "Aug. 24. Preparing proceedings, including objections and brief on objections, and contesting receiver's claim for the allowance of fees and expenses to himself and attorney's fees, \$100.00." However commendable the motive which prompted the bankrupt to participate in this contest, its zeal was misdirected. It was certainly under no legal obligation in the premises. It was the trustee's function and his duty, and it was also the right of the creditors, to oppose baseless claims, including any such claim, when put forward by the receiver; the extent of the bankrupt's obligation was to furnish to the trustee such material information as was in its possession. As a matter of fact, the trustee was making opposition to this claim, as were also some of the creditors, and to permit the bankrupt to employ counsel at the expense of the trustee when the trustee was already represented by counsel would be to sanction a wholly unnecessary charge against the estate.

The next is an item of \$750.00 for the preparation of the schedules. This being a duty clearly imposed upon the bankrupt, we have but to consider the nature and extent of the legal services necessarily involved therein and the reasonable value thereof. Unquestionably a measure of professional knowledge and skill is required for the proper discharge of such a duty, and perhaps in almost every case some allowance upon this account may properly be made, but I had supposed that rarely, if ever, could the amount exceed \$100.00, and commonly a much smaller sum would be adequate. [46] In re Meyer,

101 Fed. 695; In re O'Hara, 166 Fed. 384; In re Christenson, 17 Fed. 867; In re Connell & Sons, 120 Fed. 846.

It is, however, contended that the case is an unusual one, and assuming it to be such we shall consider it upon its own merits. It is to be borne in mind that the duty of preparing the schedules is primarily imposed upon the bankrupt. He may secure such clerical and legal assistance as are reasonably necessary, but he cannot at the expense of the estate employ attorneys and shift to them the entire burden and responsibility. The statute provides that the *bankrupt* shall "prepare, make oath to, and file in court" the schedule, setting forth certain facts; and it was contemplated that he should at least furnish the requisite information, and that the assistance provided for him at the expense of the estate would extend only to the matter of putting the information into the prescribed legal form.

It is not thought to be necessary to attempt a fine distinction between the duties which are strictly professional and those which are merely clerical, in the preparation of a schedule, but in estimating the compensation which should be allowed respect must be had to the nature of the work, for the compensation should be measured with regard to the character and quality of the service rather than the calling or profession of him by whom the service is rendered. Now, it is not to be questioned that ordinarily the work of preparing a schedule is in the main that of an intelligent accountant. In re Goldville Mfg. Co., 123 Fed. 579, 586. With a few simple instructions

touching the required contents of the schedule, the various headings under which assets and liabilities should be classified, and the formalities of execution, no competent accountant should experience serious difficulty in substantially complying with the law. In so far as we are advised by the record, the present case is no marked exception to the general rule in so far as necessary legal services are concerned; and indeed it is difficult to see how any difficult or intricate questions could be involved in any such case. It is not for [47] the bankrupt carefully to consider whether his title to property claimed by him is vulnerable or invulnerable, or with nicety to determine the exact status of debts which it is claimed he owes. The officers of the Court, as well as parties in interest, are chiefly concerned in being advised of the facts to such an extent that they may make intelligent investigation. The schedule adjudicates nothing, and is binding upon no one; at most it may in certain contingencies be regarded as *prima facie* evidence of the facts therein stated. It must therefore be held, I think, that in the main the services here rendered were such as a competent clerk or accountant might have performed, and compensation must be awarded upon that basis. I cannot attach much importance to the fact that the books and papers were in the hands of a receiver at the time the order was made requiring the bankrupt to file schedules, for I am unable to see how or why any considerable amount of service could have been required to get possession of the books. The receiver was an officer of this court, and if he was, either in good faith

or bad, withholding the books from the inspection of the bankrupt, I must assume that upon the most informal application to the referee an order would have been made requiring him, under proper conditions, to give access to the books.

Unfortunately there is wanting definite information touching one, if not the most important, factor entering into the consideration of the amount to be allowed upon this account, and that is the time which was actually and necessarily spent. If there were any assurance of more specific data upon the subject I would be inclined to refer the matter back for further testimony, but apparently no account was kept, and nothing better than the general estimate of the claimants, testifying from memory, is available. The schedule covers approximately one hundred pages of typewritten matter, and there is some testimony relating to what would be a reasonable charge for the services of a stenographer in doing the clerical work, but this estimate rests [48] upon the unwarranted assumption that the work was done by what is ordinarily called a public stenographer, whose charges, it is well known, greatly exceed the prevailing compensation of salaried office stenographers. There is no evidence that the work was done in that way, and it is to be presumed that it was performed by the claimants' regularly employed stenographer. Assuming a reasonable compensation for a competent office stenographer to be \$100.00 per month, an allowance of \$35.00 would cover a period of practically ten days, and I am satisfied that that amount of time is quite ample



in which to do all the work preliminarily and finally required of a stenographer and typist in the preparation of the schedule. For the labor of gathering together and classifying the data I shall allow compensation as for the services of an accountant, at the rate of \$15.00 per day for ten days; and as a retainer, and for legal advice incidental to the supervision of the work, \$100.00, making a total for the preparation of the schedule of \$285.00. This amount may be somewhat larger than should have been authorized if the extent of the required service and the compensation to be allowed therefor, had been prescribed in advance, but in view of all the circumstances, and taking into consideration the benefit to the estate of the service rendered, it is thought that the conclusion reached is not unreasonable and does substantial justice. It should be added that, in considering the compensation to be allowed for this service, as well as for other services to the bankrupt covered by the claim, I am not able to concur in the view apparently entertained by the claimants, that there is any very material or direct relation between the mere aggregate of the assets and liabilities of a bankrupt estate, as shown by the schedules, and the compensation to be allowed to the bankrupt's attorneys. The value of the matter involved is generally taken into consideration as an important factor in determining what is a reasonable charge for legal advice or professional service, but so far as concerns service rendered to the bankrupt neither the assets nor the liabilities of the estate represent or [49] measure the value of the matter involved. Certain

interests of the bankrupt and certain duties imposed upon him by the law, constitute the subject matter of the service. The degree of solvency of the estate may possibly be considered to the same extent as is the ability of a client to pay a reasonable fee, but here as yet it is wholly uncertain what dividend, if any, will be realized by the unsecured creditors; apparently, however, not a large one. The schedule itself is no criterion. Here for illustration the schedule discloses assets valued at \$771,201.50, and liabilities aggregating \$532,940.00, but within a few months after the filing of the schedule, upon an appraisalment in the manner prescribed by law, the official appraisers reported the entire value of the assets as being only \$217,996.63.

There remains for consideration the claim of \$1,850.00 for "attendance in bankruptcy court" at irregular intervals during the period from August, 1911, to November, 1912, thirty-seven different days, at the rate of \$50.00 per day. The magnitude of the item, if not startling, at least challenges our attention, and gives sharp emphasis to the inquiry whether it is contemplated by the bankruptcy act that estates shall be burdened with the expense of furnishing a legal attendant for the bankrupt while he is present pursuant to an order of the court at the first meeting of creditors, and sessions of the court, either to give information or to submit to examination under oath. While contingencies doubtless may arise where the assistance of counsel may be reasonably required, it is thought that there is no presumption

of such need, and that ordinarily attorney's fees for such services are not chargeable against the estate. It is urged that in certain reported decisions (*In re Michel*, 95 Fed. 803; *In re Kross*, 96 Fed. 816; *In re Mayer*, 101 Fed. 695, and *In re Anderson*, 103 Fed. 855, being cited), the contrary view has been held, but upon analysis it will be found that no one of these cases lends strong support to the [50] proposition that under all circumstances compensation for such a service is a matter of right. In the Michel case, which was presented *ex parte*, no such charge was involved. In the Kross case, Judge Brown, in rendering the decision, expressly states that: "Ordinarily I cannot regard attendance by counsel for the bankrupt at all the various examinations as necessary. The restraints on discharge being confined to acts either criminal or most plainly fraudulent and wrong, the honest and straightforward debtor has rarely need of 'counsel' unless falsely attacked, when professional aid may become proper and necessary, and should then be compensated. There is often, however, too much interference and objection by the bankrupt's attorney in the ordinary examinations in behalf of creditors, which operates in every way injuriously." In the Mayer case the question was not in issue, and was discussed only *in arguendo*. While in the Anderson case it is not very clear just how the question arose, the conclusion of the Court seems to have been that a bankrupt should be allowed such services of counsel "to the extent of protecting his rights on the inquiries" made of him. It may be that it is not unusual for a

small allowance to be made upon this account, but I have no present recollection that such a charge has ever before been called to my attention, and in the great majority of cases I can see no reason why the bankrupt should have the assistance of counsel in the performance of the simple duty required, or the burden of fees therefor imposed upon the estate. Quite obviously the purpose of requiring the attendance of the bankrupt is that he may give information, either voluntarily or under oath, touching any matter which may affect the administration and the settlement of the estate. He has no obligation except to disclose facts within his knowledge. He attends primarily as a witness, and there is ordinarily no more reason why he, as a witness, should have the protecting care of attendant counsel than that any other witness under any other circumstances should have such protection. It is not perceived why, as is somewhere suggested, [51] the bankrupt needs to be guarded against unwittingly or inadvertently doing or saying something which might be prejudicial to his right to a discharge in bankruptcy; if he is willing frankly to disclose the facts he can, as a rule, suffer no prejudice. But here even that consideration is of little moment, for no one can be greatly concerned in the question whether or not a corporation shall be discharged, or in opposing such discharge. Nor could there here arise any question touching the matter of exemptions, for a corporation is not entitled to exemptions. Ordinarily, why should not the bankrupt put himself at the service of the trustee, who is presumably not antagonistic, and



who should not, and presumably does not, have any motive or incentive to injure him or prejudice him in any of his rights? Instead of laying the facts before counsel especially employed by him, why should he not disclose them directly to the trustee or the attorney for the trustee? If it were shown that the trustee and his attorney were disposed unjustly to attack him or to treat him unfairly, possibly he should have the assistance of counsel, but ordinarily it may be assumed that if any such disposition were shown the referee or judge would check it and see that his rights were protected while acting as a witness or informant, as the court will protect a witness against wrong or abuse in any other case or proceeding in which he appears in obedience to process. It is doubtless true that the claimants here spent at least a large part of the time in attending the bankruptcy proceedings for which they claim compensation, and lest injustice be done to them I have taken the trouble to go through the voluminous stenographic report of the proceedings had before the referee, but in the main it is not apparent how their attendance was either of benefit to the estate or was needed by the bankrupt. At one time criminal prosecutions were instituted against the officers of the bankrupt in attendance, and it may be that an allowance can with propriety be made for counsel in connection with that feature of the proceedings; [52] but surely it was unnecessary to have counsel in attendance all the time in anticipation of such a need. The same contingency might arise any time in the course of the examination of a witness in court, and

in a proper case the court would doubtless give the witness an opportunity to procure counsel.

It is, however, urged by claimants that their presence was in compliance with the express order and direction of the referee. It is true that in the order made by the referee (but apparently draughted by claimants) allowing the claim there is a recital to the effect that the attendance "was under the direction and order" of the referee, but I do not find that the record justifies such a finding. One of the claimants testified that the referee asked them to attend all the hearings, but if it were to be assumed that the referee has authority to require counsel for the bankrupt to be present, surely such direction, to be efficacious, should be made of record, and oral testimony thereof must be rejected as being incompetent. Upon examining what is furnished to me as the referee's docket, containing a large number of orders pertaining to the proceeding, I find no order or direction requiring counsel to be present. There is in the order of August 22, 1911, appointing the time for the first meeting of creditors, September 7, 1911, a requirement that the bankrupt and certain of its officers therein named be present at the first meeting of creditors, and also a direction that notice of the order be sent to the bankrupt and its officers and its attorneys of record, the claimants here. Upon the same day, that is, on August 22, 1911, a specific order was formulated and entered requiring the bankrupt and its officers to appear on September 7th, and this is expressly directed to the bankrupt and to P. H. Wall, its President, and N. K. Wall and B. F.

O'Neil, its Secretary and Treasurer respectively; it makes no mention of the bankrupt's counsel. I find no other order bearing upon the subject. [53]

With the one exception noted I am unable to find from the whole record, that there was any reasonable need for the attendance of the claimants at the meetings of creditors or the sessions of the court, as counsel for the bankrupt, and considering all services under this head, which were of benefit to the estate or which fall within the rule hereinbefore stated, it is thought that \$100.00 is all that can properly be allowed upon this account. In that view it becomes unnecessary specifically to find upon the issue whether the attendance covered thirty-seven days, as contended for by the claimants, or only thirty days, as asserted by the trustee. Nor need we determine what would be a reasonable per diem allowance for such attendance, taking into consideration the actual amount of time spent upon each of the several days and the character and scope of the business then under consideration. It is doubtless true, and it is much to be regretted, that the amount allowed is in any view inadequate reasonably to compensate for the time claimants have actually spent upon this account, but, as was said by Judge Phillips in *In re Harrison Mercantile Company* (95 Fed. 123), "while the Court personally would be pleased to exercise a spirit of large liberality both towards attorneys and its officers assisting in the administration of bankrupt estates, it must be understood that the court is impressed with a sense of the obligations imposed upon it by the bankrupt act, to so administer it as to

preserve both the letter and the spirit of the statute and produce the best results in behalf of creditors." That economy of administration is enjoined by the spirit of the Act cannot be gainsaid. *In re Curtis*, 100 Fed. 792.

The order appealed from will therefore be reversed with directions to allow claimants \$385.00, the same to be paid in due course of administration, if there are sufficient funds available therefor; otherwise the claim is to share ratably with others of like dignity.

Filed July 7, 1913. A. L. Richardson, Clerk.  
[54]

### [Statement of Meetings.]

"A-O."

### MEETINGS.

1911.

Sept. 7, 10:	A. M.....	P. 1
	1:30 P. M.....	P. 4
Sept. 8, 9:30	A. M....	P. 36
	1:30 P. M.....	P. 57
Sept. 9, 9:30	A. M.....	P. 106
	1:30 P. M.....	P. 140
Sept. 27, 1:	A. M.....	P. 178
Oct. 23, 10:	A. M.....	P. 182
Nov. 13, 10:	A. M.....	P. 186
Dec. 4, 10:	A. M.....	P. 190
	2: P. M.....	P. 194
Dec. 5, 10:	A. M.....	P. 236
Dec. 5, (Continued from Book 1)		P. 238
Dec. 5, 1:30	P. M.....	P. 270



Dec.	7,	10:00 A. M.	.....	P.	330
Dec.	7,	2:00 P. M.	.....	P.	391
Dec.	8,	10:00 A. M.	.....	P.	439
Dec.	9,	10:00 A. M.	.....	P.	447
Dec.	9,	(Continued from Book 2)	.....	P.	475
		Examination of Officers of Bank-			
		rupt.			
Dec.	9,	2:00 P. M.	.....	P.	487
		Examination of Officers of Bank-			
		rupt.			
Dec.	29,	10:00 A. M.	.....	P.	575
		Relative to Appraisers' Report.			
Dec.	30,	10:00 A. M.	.....	P.	599
		Relative to Appraisers' Report.			
1912.					
Jan.	3,	10:00 A. M.	.....	P.	600
		Relative to Cruise.			
Jan.	6,	1912,	See Book 4.		
Jan.	9,	1912.	.....	P.	707
		Additional Cruise, Submitted by			
		Trustee. [55]			
Feb.	12,	10:00 A. M.	.....	P.	710
		Relative to Report of Receiver.			
Feb.	12,	1:30 P. M.	.....	P.	732
		Continued from forenoon.			
Feb.	20,	10:00 A. M.	.....	P.	752
		Ruling on Trustee's Objection.			
Feb.	20,	2:00 P. M.	.....	P.	757
		Relative to Order to Show Cause.			
Feb.	24,	10:00 A. M.	.....	P.	767
		Meeting Adjourned.			

Feb. 24,	1:00 P. M.....	P. 767
	Objections to sale.	
Apr. 10,	10:00 A. M.....	P. 793
	Allowance of Claims.	
Apr. 10,	1:30 P. M.....	P. 816
	Allowance of Claims continued.	
Apr. 16,	10:00 A. M.....	P. 878
	Continued to Apr. 18,	
Apr. 18,	10:00 A. M.....	P. 879
	Confirmation of Proposed Sale and Petition to Dismiss Peti- tion to Review.	
Apr. 25,	10:00 A. M.....	P. 885
	Relative to Copy of Audit.	
May 2,	10:00 A. M.....	P. 888
	First Bank of Harrison.	
May 10,	10:00 A. M.....	P. 889
	Claims.	
May 10,	11:00 A. M.....	P. 897
	Claims.	
May 10,	2 P.M....	P. 908
	Claims.	
May 24,	11:00 A. M.....	P. 989
	Murray Claim.	
May 24,	2:00 P. M.....	P. 1005
	Murray Claim.	
June 11,	11:00 A. M.....	P. 1016
	First Bank of Harrison.	
June 11,	2:00 P. M.....	P. 1031
	First Bank of Harrison.	
June 12,	10:00 A. M.....	P. 1117
	Claims.	

June 12,	1:30 P. M.....	P. 1140
	Claims. [56]	
July 15,	11:00 A. M.....	P. 1183
	To approve sale of property.	
July 26,	11:00 A. M.....	P. 1195
	Claims.	
July 26,	2:00 P. M.....	P. 1205
	Claims.	
July 27,	10:00 A. M.....	P. 1235
	Claims, Examination of Bank- rupt, and Mr. Boyd's trip east.	
Aug. 16,	10:00 A. M.....	P. 1286
	Claims.	
Aug. 16,	1:30 P. M.....	P. 1295
	Claims.	
Sept. 26,	10:00 A. M.....	P. 1303
	Claims, Receivership Claims.	
Oct. 14,	11:00 A. M.....	P. 1320
	Claims.	
Oct. 14,	2:00 P. M.....	P. 1334
	Claims.	
Oct. 15,	10:00 A. M.....	P. 1384
	Claims.	
Oct. 15,	2:00 P. M.....	P. 1412
Oct. 22,	2:00 P. M.....	P. 1433
	Sale of Railroad, Dirty Dick, Remaining Assets except tim- ber.	
Nov. 4,	10:00 A. M.....	P. 1448
	Duval Jackson Refund Matter.	
Nov. 11,	2:00 P. M.....	P. 1450

Sale of Railroad, and Sale of Remaining Assets except timber.

Nov. 12, 10:00 A. M. . . . . P. 1464

Confirmation of Sale of Remaining Assets except timber.

Filed Sept. 19, 1913. A. L. Richardson, Clerk.  
[57]

[Letter Dated August 5, 1913, from R. S. Nelson to Clerk U. S. District Court.]

WHITLA & NELSON,  
Attorneys at Law,  
Coeur d'Alene, Idaho.

August 5, 1913.

Mr. A. L. Richardson,  
Clerk of the U. S. District Court,  
Boise, Idaho.

Dear Sir:—

Please find enclosed the praecipe for transcript in the Lane Lumber Company Bankruptcy matter. The transcript is to be used in the review of the decision of the District Court in reducing the claim of Whitla & Nelson, attorneys for Bankrupt. We desire to take this to the Circuit Court of Appeals. The Transcript is to include the following:

1. The Petition of Whitla & Nelson for allowance of attorney's fees, marked Exhibit "A."
2. The objection of the Bank of California and Price, Waterhouse & Company, marked Exhibit "B."
3. The objection of L. C. Wilson, receiver of the



State Bank of Commerce of Wallace, marked Exhibit "C."

4. The objection of Samuel Boyd, Trustee, marked "D." (Not on file.)

5. Order of referee setting said petition and objection down for hearing, marked Exhibit "E."

6. The testimony taken at said hearing before the referee, marked Exhibit "F."

7. Order for findings, allowing said attorney's fees, marked Exhibit "G."

8. Petition to review the referee's order allowing Whitla & Nelson, attorneys for bankrupt, \$2755.00, marked Exhibit "A."

9. Report of referees in bankruptcy, and an order allowing attorney's fees, marked Exhibit "I."

10. Decision of the Honorable District Judge on claim of bankrupts for attorney's fees, marked Exhibit "J."

11. Copy of referee's appearance docket showing dates of hearing, marked Exhibit "A-O."

Yours very truly,

R. S. NELSON.

Enc.

RSN/T.

Filed Sept. 8, 1913. A. L. Richardson, Clerk.

[Certificate of Clerk U. S. District Court to  
Transcript of Record.]

*In the District Court of the United States, District  
of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,  
Bankrupt.

United States of America,  
District of Idaho,—ss.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing copies of Petition of Whitla & Nelson for allowance of attorneys' fees, objection of the bank of California and Price, objection of L. C. Wilson, order of referee setting said petition and objection down for hearing, the testimony taken at said hearing before the referee, order for findings, petition to review the referee's order, report of referee, decision of District Court, copy of referee's appearance docket and Clerk's certificate, have been by me compared with the originals and that it is a correct transcript therefrom and of the whole of such originals as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court in said district this 20th day of Sept. 1913.

[Seal]

A. L. RICHARDSON,  
Clerk. [59]

[Endorsed]: No. 2336. United States Circuit Court of Appeals for the Ninth Circuit. Whitla & Nelson, a Copartnership, Attorneys for the Lane Lumber Company, a Corporation, Bankrupt, Petitioner, vs. Samuel Boyd, Trustee in Bankruptcy of the Lane Lumber Company, a Corporation, Bankrupt, and L. C. Wilson, Receiver of the State Bank of Commerce of Wallace, Idaho, Respondents. In the Matter of the Lane Lumber Company, a Corporation, Bankrupt. Petition for Revision and Transcript of Record in Support Thereof, Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Idaho, Northern Division.

Filed October 31, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.





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No. 2336

United States

Circuit Court of Appeals

For the Ninth Circuit

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WHITLA & NELSON, a Copartnership, Attorneys  
for the LANE LUMBER COMPANY, a Cor-  
poration, Bankrupt.

Petitioner

vs.

SAMUEL BOYD, Trustee in Bankruptcy of the  
Lane Lumber Company, a corporation, Bank-  
rupt, and L. C. WILSON, Receiver of the State  
Bank of Commerce of Wallace, Idaho,  
Respondents.

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IN THE MATTER OF THE LANE LUMBER  
COMPANY, A CORPORATION, BANKRUPT

---

BRIEF OF PETITIONERS

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EZRA R. WHITLA,  
RALPH S. NELSON,  
In Proper Person.  
Residence and P. O. Address,  
Coeur d'Alene, Idaho.  
Attorneys for Petitioners.

GRAVES, KIZER & GRAVES,  
Residence and P. O. Address,  
Spokane, Washington,  
Of Counsel



**United States**

**Circuit Court of Appeals**

**For the Ninth Circuit**

---

WHITLA & NELSON, a Copartnership, Attorneys  
for the LANE LUMBER COMPANY, a Corporation, Bankrupt.

Petitioner

vs.

SAMUEL BOYD, Trustee in Bankruptcy of the  
Lane Lumber Company, a corporation, Bankrupt, and L. C. WILSON, Receiver of the State  
Bank of Commerce of Wallace, Idaho,

Respondents.

---

IN THE MATTER OF THE LANE LUMBER  
COMPANY, A CORPORATION, BANKRUPT

---

**BRIEF OF PETITIONERS**

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Statement of Fact

Sec. 1. Statement: PRECISE QUESTION  
SUBMITTED.

The precise question as submitted to the District Court by the referee in bankruptcy in this matter, as shown by the record, was, "Is the amount allowed the attorneys for the bankrupt herein, as attorneys' fees in said proceeding, to wit, the sum of twenty-seven hundred and fifty-five (\$2755.) dollars, excessive? (Record, page 55.)

On a writ of review to the District Court it reduced the above allowance from \$2755.00 to \$385.00. (Record, page 72).

The question now before this court is: 1st. Did the District Court err in refusing to allow the attorneys fee for preparing the schedules at professional rates and reducing the allowance made by the referee to a sum set by him as reasonable compensation for clerical work?

2nd. Did the District Court err in refusing to allow bankrupt's attorneys a per diem for the services actually rendered in attending the first meeting of creditors as counsel for the bankrupts, when it was ordered to attend by the referee.

Stated otherwise, is the sum of \$2755.00 or the sum of \$385.00, a reasonable fee to be allowed in this case for the work done, taking into consideration the *nature of the service, the time necessarily employed thereon, the amount involved, the responsibility assumed, and the result obtained?*

## Sec. 2. Statement: NATURE OF SERVICE. PREPARATION OF SCHEDULES.

On the 29th day of July, 1911, the above named Lane Lumber company, a corporation, was duly adjudged an involuntary bankrupt by the United States District Court, for the District of Idaho, Northern Division. At about this time P. H. Wall, president of the bankrupt corporation, came to the offices of Whitla & Nelson, your petitioners, in Coeur d'Alene, Idaho, and made arrangements with



the firm to represent the corporation in the bankruptcy proceedings. By this arrangement Whitla & Nelson were to prepare the schedules for the corporation and to do all acts necessary to properly represent it in said proceedings.

The corporation had no funds to pay the attorneys and it was agreed between its officers and your petitioners that your petitioners were to be paid whatever amount the court would allow them as attorneys for the bankrupt. the entire matter was to be submitted to the court and it was to make the allowance for the services performed. No other payment was made for the services of the attorneys.

At the time of this agreement the bankrupt had been out of the possession of its books for several months, the corporation having been in the hands of L. F. Connolly, receiver, who had been appointed several months previous to the adjudication of bankruptcy, by the District Court of the First Judicial District of the State of Idaho. The officers of the bankrupt corporation did not know the exact condition of its affairs and had no accurate recollection as to a great many of the claims, that is as to whether they were secured or unsecured, the amount, and had no knowledge as to what was to go into the schedules. Most of its financial transactions had been handled by its treasurer, B. F. O'Neil, President of the State Bank of Commerce of Wallace, who was the principal stockholder, and who was also a fugitive from justice on account of his

banking transactions, *State v. O'Neil*, 135 Pac. 60.

It was therefore absolutely necessary that your petitioners have the books of the bankrupt corporation before they could intelligibly prepare the schedules. The receiver in the state court refused to turn over the books and records to the bankrupt corporation or to its officers, or to their attorneys, your petitioners. Several attempts were made to get possession of these books and it finally became necessary for your petitioners to make a written application to the court and secure an order directing the Receiver to allow them the possession of the books for the purpose of preparing the schedules. This order was granted by the court and the books finally obtained, all of which took considerable time.

When the books were obtained your petitioners discovered that they had been kept in a very loose and unbusinesslike manner. The record herein will disclose that many matters of personal concern were mixed with those of the corporation in keeping the books, and that the books, which included transactions covering a period of a number of years, had, during a greater part of the time, been kept as above stated, in a very loose and unbusinesslike manner and it made the preparation of the schedules very difficult. It was necessary for your petitioners to examine carefully and at great length the books of the company and both Mr. Whitla and Mr. Nelson, and their stenographer, Mr. Nash, spent about three weeks time in going over these books and

in preparing the schedules. (Record, pp. 28-29).

To ascertain the exact condition of some of the claims that they might be intelligibly listed in the schedules it was necessary for Mr. Whitla, one member of the firm to make several trips to Spokane to interview different creditors. (Record, p. 29). The schedules covered something like one hundred typewritten pages.

Sec. 3. Statement: NATURE OF SERVICES.  
ATTENDANCE UPON FIRST MEETING OF  
CREDITORS.

The first meeting of creditors included thirty-seven different hearings, all of which your petitioners attended on behalf of bankrupt. The Referee before whom all of the hearings were had, and, of course, was well informed in the matter, found in his findings, (Record, pp. 41-42): "The court finds that bankrupt's attorneys appeared and took part in the hearings in this case thirty-seven days, and that all of said time was necessarily employed by said attorneys and that in addition to said time attorneys also spent a large amount of time and labor in advisory services with said bankrupt and in preparing authorities upon various questions involved, *and the attendance of said bankrupt's attorneys in court on all of said days was under the direction and order of this court.*

During this great number of hearings your petitioners were in almost constant consultation with the officers of the bankrupt and did everything in

their power to assist the administration of the estate and did nothing to retard or delay the administration of said estate. Your petitioners had many conferences with the attorney for the trustee in securing the true facts of the complicated matter.

Sec. 4. Statement. NATURE OF SERVICES. OBJECTIONS TO THE CLAIM OF L. F. CONNOLLY, RECEIVER.

During the administration of the estate, L. F. Connolly, receiver in the state court, filed in the bankruptcy court, as receiver in said state court, a claim for a large amount of expenses, including attorney's fees, which were deemed improper on behalf of the bankrupt. The attorneys for bankrupt objected to said claim and filed their objections in writing and also made their objections in open court, which were concurred in by others. No one, including the trustee, cared to urge their objections or prepare a brief and attorneys for bankrupts, your petitioners prepared a brief and made oral argument to the court in the matter.

The Court sustained the objections to the claim of the Receiver and there was approximately eleven or twelve hundred dollars asked for by the Receiver in the State Court, disallowed. Two days time of petitioners was spent in getting out their brief and some little time spent in arguing the same before the Referee.



Sec. 5. Statement. TIME NECESSARILY EMPLOYED.

The officers of the bankrupt corporation made arrangements with petitioners to represent them some time ~~ago~~ about the 29th day of July, 1911, and about three weeks time of both members of the firm and their stenographer was spent in preparing the schedules.

The first meeting of creditors, all of the hearings of which your petitioners attended, and which were thirty-seven in number, extended from about the 26th day of August, 1911, to the 25th day of November, 1912. From the time of the employment of your petitioners as attorneys to represent the bankrupt to the final adjournment of the first meeting of creditors November 25, 1912, a period of sixteen months, your petitioners were busy in this matter, not only in preparing schedules and attending meetings of creditors, but spending many days in their office preparing for the work, advising with their clients and with the trustee. The testimony taken covered about 1500 pages.

Sec. 6. Statement. AMOUNT INVOLVED.

The schedules disclose liabilities in the sum of \$415,874.78, and assets claimed by the bankrupt, worth \$771,201.50. Of this \$532,940 was real estate, the balance consisted of personal property and accounts.

The value put upon this property by the officers of the bankrupt may have been very much too high,

or the appraisers may have appraised the property too low, but be that as it may, the appraisers appraised the value of the property at only \$217,996.63.

On October 1, 1908, a trust deed was placed on the property of the corporation under which bonds in the sum of \$125,000 were sold. A large amount of timber lands was also secured after this, and a large new mill was also afterward built.

The property at that time was not nearly so valuable when it was bonded as at the time the company was adjudicated bankrupt, and as a matter of common knowledge, and we think the court will consider the same, that bonding companies before considering large loans like this, investigate the property and loan not to exceed one-third of what they find the value of the property to be at that time. The property considered to be one of the largest sawmill plants in North Idaho, located at Harrison, Idaho, which was built after the above mentioned bond issue was made. Besides this it was an operating going concern, having on hand a great amount of sawed lumber, lathe and logs, sufficient to conduct the business of a wholesale lumber manufacturing plant and had all the necessary horses, trucks, logging outfit, boats, machinery of every kind and extensive logging-railroad equipment.

Sec. 7. Statement. RESPONSIBILITY ASSUMED.

As above stated the books and records of the Lane Lumber company, bankrupt, were in a very

complicated and chaotic condition and the officer who had handled the principle financial affairs of the company was a fugitive from justice.

Again, your petitioners by becomming attorneys for the bankrupt were precluded from claims in the estate and as a matter of fact turned away thousands of dollars worth of claims which they would have represented had they not been attorneys for the bankrupt, and some of these claims were afterwards allowed as prefered claims.

The bankrupt company was one of the large corporations of North Idaho. As found by the appraisers the property was worth \$217,996.63. The preparation of the schedules on account of the condition of the records of the company was very difficult and a firm of lawyers preparing such schedules for the court in a case like this where the preparation of the same is difficult on account of the complicated condition of affairs, desire greatly to have the same so prepared that the court will have some definite idea of what the property of the bankrupt consists, of its nature, description and value when they are filed.

During the administration of this estate the trustee filed and swore to eighteen criminal complaints against the officers of the bankrupt. On all of these charges the court before whom the cases were tried held that there was not sufficient evidence to warrant holding the defendants. There was during the entire first meeting of creditors a disposition on

the part of the trustee and some of the creditors to institute criminal proceedings against the officers of the bankrupt corporation and to hold that the bankrupt was guilty of criminal acts. This feeling was probably caused to some degree by the chaotic condition of the books and of the loose manner in which the business of the bankrupt concern had been conducted. The Referee in bankruptcy, undoubtedly aware of this feeling for the bankrupt corporation ordered your petitioners to attend all meetings of creditors. (Record, p. 41-42).

Your petitioners during all of the meetings of creditors did everything possible at all times to bring a proper understanding of the books and affairs of the corporation to the creditors of the bankrupt and did everything possible to facilitate the administration of affairs and spent much time in studying the affairs of the bankrupt corporation and in consulting with its officers to the end that all of its affairs might be satisfactorily explained to the court and creditors.

The work of your petitioners was not at all times pleasant but bearing in mind their duty as attorneys and officers of the court, did everything to hasten the administration of the estate.

Sec. 8. Statement. **THE RESULT OBTAINED.**

The Schedules as prepared by your petitioners, although they cover almost one hundred pages of typewritten matter and include many technical de-



scriptions of real property, fully set forth all of the property of the bankrupt and stated the condition of all the different claims as fully as possible and was entirely satisfactory to the Referee in bankruptcy and the trustee.

The result obtained by your petitioners objecting to the claim of L. F. Connolly, receiver in the state court, as filed by him in this matter, was the expunging of a claim in the sum of eleven or twelve hundred dollars against the estate, which would have been a prior claim. A charge of \$100 was made for the services in the proceedings included in the objections and brief on objections and contesting the claim of L. F. Connolly, receiver, for allowance of fees and expenses to himself and attorney. As above stated as a result of these services his claim was reduced some eleven or twelve hundred dollars. (Record, p. 41).

The result of your petitioners attending all meetings of the creditors was entirely satisfactory to the referee in bankruptcy, who found that all the time they had spent in attendance upon the same was necessary. That their attendance upon these meetings undoubtedly hastened greatly the administration of the estate and produced a clear and full understanding of all the complicated affairs of the bankrupt corporation by the trustee and creditors on the one hand and the corporation on the other.

Sec. 9. Statement. FEE AS CLAIMED BY PETITIONERS.

A charge of \$25.00 on August 4, 1911, and a charge of \$15.00 on August 7, 1911, and another charge of \$15.00 on August 12, 1911, was made against the bankrupt for matters connected with the Connolly receivership after the bankruptcy proceedings had been instituted and prior to the time the schedules were filed. These charges were relative to the matter of securing possession of the books so that the schedules could be properly prepared.

Several consultations were held by the officers of the bankrupt company and your petitioners in reference to how the books were to be obtained and several attempts were made to get these books before the application to the court was made by the petitioners, but finally it became necessary for your petitioners to make application to the court for an order to secure these books, which was granted.

A charge of \$750 was made for the preparation of the schedules. The undisputed testimony is that almost three weeks time of both members of the firm and the stenographer was spent in preparing these schedules. (Record, p. 29), and the referee in bankruptcy so found in his finding. The Honorable District Judge made allowance for getting together the data for preparing the schedules for ten days but allowed only what he thought an accountant could be employed for, or \$15 per day. (Record, p. 65).

A charge of \$50 per day was made for attending the bankruptcy court for thirty-seven days. Besides attending the hearings on the thirty-seven different days your petitioners spent probably as many days in consultation and advising with the officers of the bankrupt in regard to their testimony and in regard to the affairs of the corporation to assist in the administration thereof and in preparing for the many legal questions involved, but no charge was made for any advice given during the first meeting of creditors or for the time spent in the office looking up authorities and in preparing papers. Your petitioners intended that \$50 per day charge for actual attendance in court should cover all the other work done.

Sec. 10. Statement: FINDING OF REFEREE ALLOWING ATTORNEY'S FEES.

On the 11th day of December, 1912, and after the final adjournment of the first meeting of creditors your petitioners filed a petition with the referee in bankruptcy praying for the allowance of attorneys' fees to them as attorneys for the bankrupt, attached to which was an itemized account of said services. Objections to the allowance of said attorneys' fees was filed on behalf of some of the creditors. On the 9th day of April, 1913, after due notice given to all of the creditors, the petition for the allowance of attorneys' fees to your petitioners, came regularly on for hearing before the referee in bankruptcy. None of the objecting creditors or their attorneys,

or anyone on their behalf, appeared in said hearing. The Referee directed your petitioners to proceed with their proof, whereupon said petition, the objections thereto, the itemized fee bill attached to said petition, and the testimony submitted by claimants were fully heard and considered by the Referee and the matter taken under advisement. (Record, p. 39).

No one appeared in support of the objections to the allowance of the fees and proof of the nature of the services rendered was not gone into at great length, but oral testimony of the reasonableness of the charge was submitted. (Record, p. 39).

On the 19th day of May, 1913, the Referee in bankruptcy made and filed his order allowing your petitioners the sum of \$2755.00 as fees, and thereafter and on the 28th day of May, 1913, a petition for review was filed by L. C. Wilson, receiver of the State Bank of Commerce, and E. N. LaVeine, attorney for the trustee. The petition for review with all necessary papers were submitted to the District Judge for hearing. Said petition for review come on for hearing before the District Court and said matter was duly heard and considered and taken under advisement. Thereafter and on the 7th day of July, 1913, said District Judge rendered his decision revising the order of the Referee and directing that only \$385 be paid to your petitioners instead of the sum of \$2755, and further directed that said sum be paid in the course of administration, if there were sufficient funds available therefor, otherwise the



claim was to share ratably with others of like dignity.

Sec. 11. Statement.—ORDER AND FINDING OF REFEREE IN ALLOWING ATTORNEYS' FEES.

The Referee in bankruptcy before whom all of the proceedings were taken and before whom the testimony in regard to the work done and the reasonableness of the fee, was submitted and who is better acquainted probably with the facts than any other person and with the feeling existing during the meeting of creditors, found that the different charges made by your petitioners were reasonable and further found, "That for these services said attorneys have made a charge of \$50 per day for the time actually spent in court and no extra charge has been made for the advisory services and research and preparation made by said attorneys, and the court finds that said charge was and is a reasonable charge for said services and that the bankrupt's attorneys are entitled thereto, and that the services in all amount to the sum of \$2755, which said sum was and is a reasonable charge and allowance to be made to bankrupt's attorneys for the services performed herein."

SPECIFICATION OF ERRORS.

I.

The District Court erred in holding that petitioners were not entitled to compensation for the services rendered in getting possession of the books

of the bankrupt so that the necessary data could be secured therefrom with which to prepare to schedules, being the bills presented for fees on August 4, \$25.00, August 7, \$15.00 and August 12, \$15.00.

## II.

The court erred in holding that petitioners and appellants were not entitled to an allowance of \$100.00 for their services in contesting the claim of L. F. Connolly and in expunging the same as charged for in their fee bill, and as allowed by the Honorable Referee in Bankruptcy.

## III.

The court erred in holding that petitioners as attorneys for the bankrupt were not entitled to the sum of \$750.00 for preparing the schedules of the bankrupt, and also in holding that the services performed in securing the data with which to prepare said schedules was the work of an accountant and in refusing to allow for said services the professional rates of an attorney, and in making an allowance therefor as for the services of an accountant at the rate of \$15.00 per day for ten days, in that this was the duty required of the bankrupt by the bankruptcy law for which it was entitled, under the bankruptcy law, to employ counsel, and to receive payment for such counsel at professional rates.

## IV.

The Honorable District Court erred in holding that petitioners were not entitled to a per diem for their time in the bankruptcy court on the first meet-

ing of creditors, covering a period of thirty-seven days from August 1911, to November, 1912, at the rate of \$50.00 per day and in rejecting this claim and refusing the bankrupt compensation for such services, excepting the sum of \$100.00, in that the bankruptcy law imposes upon the bankrupt the duty of attending the first meeting of creditors when ordered and directed to do so by the court or judge thereof, and in this case the bankrupt's officers were directed to attend the first meeting of creditors by the court and did attend as shown by the record a period of thirty-nine days, and the bankrupt's counsel was in attendance during thirty-seven days under the direction and requirement of the Referee in Bankruptcy, and a per diem of \$50.00 per day as charged for for said time was reasonable for such services.

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## V.

The Honorable District Judge erred in holding that in consideration of economy it was required by the bankruptcy law that the fees in such cases should be reduced to a small amount, even to the extent that the amount allowed the bankrupt's attorneys would be inadequate reasonably to compensate them for the time actually expended upon the hearing, for the reason that the bankruptcy law requires that as a matter of right a reasonable compensation be paid to the attorneys for bankrupt in involuntary cases while performing the duties imposed upon them by the Bankruptcy Act.

## VI.

The Honorable District Judge erred in reducing the allowance made by the Referee in Bankruptcy from \$2755.00 to \$385.00 for the reason that the allowance made by the Referee, to-wit, the sum of \$2755, was but a reasonable compensation for the services of the bankrupt's attorneys, performed for the bankrupt while discharging the duties imposed upon him by law, and all of the evidence introduced in this action shows that the sum of \$50 for the time actually expended in the bankruptcy court was but a reasonable charge therefor, and that the other charges made by the bankrupt's attorneys were but reasonable charges for the services performed, and that all of said services were such as were imposed upon the bankrupt by the Bankruptcy Act and for which an attorney's fee was allowable, and the amount allowed by the Referee was but reasonable compensation for the professional services actually performed for the bankrupt in the performance of the duties imposed upon it by the Bankrupt Act.

ARGUMENT AND CITATION OF LAW AND  
AUTHORITIES.

Sec. 12. BANKRUPTCY LAW INVOLVED.

(The Itatics throughout this brief are ours.)

The bankruptcy law relating to the duties of the bankrupt are as follows:

“Sec. 7. Duties of Bankrupt.—a. The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge



thereof to do so, and the hearing upon his application for a discharge, if filed; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, \* \* \* a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residence, if known, if unknown, that fact to be stated, the amount due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate."

This is the provision for the duties of the trustee, and Section 64, b, subdivision 3, providing for the cost of administration, provides as follows:

"(3)" The cost of administration \* \* and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the peti-

tioning creditors in involuntary cases, to the bankrupt in involuntary cases *while performing the duties herein prescribed*, and to the bankrupt in voluntary cases, as the court may allow."

Sec. 13.—ATTORNEYS NECESSARY IN PREPARING SCHEDULES.

Judge Dietrich in his opinion in reference to the legal services required in preparing the schedules holds:

"Unquestionably a measure of professional knowledge and skill is required for the proper discharge of such duty, and perhaps in almost every case some allowance upon this account may properly be made \* \* \* ".

There can be no question but what when the bankrupt's affairs are in a complicated condition and the officers of the corporation have been out of its control for some time and the assets of the corporation are worth several hundred thousand dollars, consisting of sawlogs, lumber, large lumber plant, a great deal of real estate covering a vast area, together with other personal property and accounts, and the assets of such corporation are over \$750,000 the services of an attorney is necessary in preparing the schedules. In the case at bar the books and accounts of the corporation, consisting of a wagon load of records, were before the referee in bankruptcy and were examined on numerous occasions by him and he was acquainted with the work that the attorneys did in preparing the schedules and the trouble they had in arriving at the facts. The referee in bank-

ruptcy knew all of these facts, explicitly found that the services of the attorneys were necessary and that the attorneys spent about three weeks time in preparing such schedules and that such work was worth \$750.

Judge Dietrich says: "It is difficult for him to see how any difficult or intricate question could be involved in such a case." He had before him no evidence or finding in conflict with the finding of the referee. It seems to us that it is unfair for the judge to hold "that the services rendered were such as a competent clerk or accountant might have performed, and compensation must be awarded upon that basis," when the referee knowing all of the facts in the case and hearing the evidence and knowing the complicated condition of the books and chaotic condition of the accounts, and the question involved, found that the work was not that of an accountant. (Record, p. 40), but that it was necessary for the attorneys to spend the time on these schedules that they did spend. (Record, p. 40).

The court, *In Re Andersen*, 103 Fed. 855, says:

"The bankrupt in such cases is required to prepare schedules, which require the services of a lawyer: and, if he is compelled to attend references before the referee in matters involving the conduct of his business prior to the bankruptcy, he should be allowed services of counsel, to the extent of protecting his rights on the inquiries so made. This is in aid of the proper ad-

ministration of the estate, and allowances out of the estate should be strictly limited to services so rendered."

In that case the court held that the attorney was entitled to his fees for *all* services rendered in the line of the duties performed by him.

*In Re Kross*, 96 Fed. 816, the court says:

"Among the first and most important duties specially enjoined by the act upon the bankrupt in involuntary cases that presumably require an attorney's services are those stated in paragraph 8 of section 7, viz.: the preparation and filing of schedules of his property and creditors, with all the particulars there specified. In voluntary cases the same schedules are required to accompany the petition; and ordinarily bankrupts are unable to prepare such papers properly, or to comply with the rules and orders pertaining thereto, except by the aid of a professional attorney."

#### Sec. 14. COUNSEL NECESSARY AT MEETING OF CREDITORS.

It may not be necessary for counsel for bankrupt in every case to attend all the meetings of creditors, but in the case at bar the referee in bankruptcy held that "the attendance of said bankrupt's attorneys in court in all of said days was under the direction and orders of this court." (Record, p. 41). This is the testimony and is undisputable. (Record page 34.) Judge Dietrich says that he had before



him a number of orders but did not find among them any order of the referee requiring your petitioners to attend the meeting of creditors. (Record, p. 70).

It seems to us unfair for the learned judge, in the absence of any evidence to support such a finding, to hold that the referee did not order your petitioners to attend said meetings of the creditors or that the attendance upon said meetings was unnecessary. The bankruptcy act provides that the bankrupt shall be present at the first meeting of creditors if directed to do so. Judge Dietrich holds bankrupt's officers were ordered to attend (page 70)

*Remington on Bankruptcy*, para. 2086:

"It has been contended that bankrupt should not be entitled to reimbursement of his attorney's fees for the attorney's presence at the bankrupt's general examination, on the theory perhaps that all the bankrupt has to do on his general examination is to testify to the truth and that he needs no attorney to help him do that. The practice, however, is the other way, and attorney's fees for attendance at the bankrupt's examination are customarily allowed."

The Federal Court has even held that where the client was in contempt that notwithstanding the fact that the attorney was entitled to a per diem allowance for the time actually expended.

*In Re Mayor*, 101 Fed. 695;

The preparation of schedules by the bank-

rupt in involuntary cases, and his attendance on compulsory examination before the referee, are matters in discharge of his duty, for the benefit of the estate, and each may require the services of an attorney, for which the estate thus receiving the benefit is chargeable for reasonable compensation; \* \* \* I am of the opinion that bankrupt is entitled to counsel while undergoing his examination before the referee in respect of his affairs in conduct. Ordinarily this should not require attendance on more than one or two days. If extended, however, at the instance of the creditors or trustee, without delay needlessly caused by the conduct of the bankrupt in the examination, the time so occupied must be computed in making the allowance. The examination should be conducted with reasonable dispatch, and without unnecessary adjournments; and if in any case, there is procrastination or prolixity on the part of the moving parties, the increased expense must be borne by the estate represented. The number of days of actual service within this view will be determined by the referee, and thereupon a per diem allowance of \$25, as charged in the statement filed herein, is deemed reasonable, and in accord with the views expressed in *Re Curtis, supra*."

In *Re Coonolly & Son*, 120 Fed 886, cited by the trustee in the lower court to sustain their contention that your petitioners were charging for mere

clerical work, the court will find by a perusal of this case that it was there held by the District Judge that counsel fees for preparing the schedules were allowable and also counsel fees for the time spent in going over the books were allowable, but disallowed the items charged for posting bankrupt's books and making extra copies of the schedules. No charge for clerical work as set forth in that case is attempted to be charged for here. In this matter the bankrupt's attorneys are charging for the preparation of the schedules covering about one hundred pages, and for services in securing the information which it was absolutely necessary to have in order to prepare the schedules.

There is no charge whatever for clerical services such as posting of books or making extra copies of the schedules, as was attempted to be done in the Connolly case above cited. The referee in bankruptcy specifically found that the charges of the attorneys and the work of the attorneys did not cover or include any clerical work.

In the ordinary cases where \$50 is allowed for preparing schedules they are prepared on blanks furnished by the court, but in this case the schedules speak for themselves, covering 100 pages of typewritten matter and as the referee knew, the facts therein set forth were obtained by the attorneys only through great labor.

It seems to the appellants that the entire premises upon which the Honorable District Judge has bas-

ed his decision is erroneous and cannot be sustained upon any principal of law in this case.

Section 7, subdivision a, of the Bankruptcy Act, provides what are the duties of the bankrupt and among them are “(1) to attend the first meeting of creditors if directed by the court or judge thereof so to do.”

The Honorable District Judge has found that the bankrupt was required by an order of the court to attend this first meeting of creditors.

Subdivision 8 of this same Act makes it his duty to prepare, make oath to and file in court schedules of his property, showing the amount, kind thereof and its location and money value thereof in detail, and also requires a detailed statement of the affairs of the bankrupt and this evidently was meant to be for the benefit of the trustee and creditors so that the trustee and creditors upon the examination of the schedules could find the location, character and value of the bankrupt's property, and also a detailed statement of his affairs including all of his creditors, their securities, if any, and otherwise.

Section 67b of the Bankruptcy Act provides among other things, what is to be charged as costs of administration as follows:

“3. The cost of administration ----- for one reasonable attorney's fee for the professional services *actually rendered*, irrespective of the number of attorneys employed, to the petitioning creditors in voluntary cases, *to the bankrupt*



*in an involuntary case, while performing the duties herein prescribed and to the bankrupt in voluntary cases as the court may allow.''*

Your petitioners respectfully submit to this honorable court that under the construction of the statute that the law has specifically provided for the payment of an attorney's fee to the bankrupt in involuntary cases for professional services actually rendered while performing *any* and *all* of the duties imposed upon him by law, and it is not for the court to say whether or not he thinks the bankrupt might have been able to get along without an attorney, as the statute has specifically provided for the payment to him of such a fee, and also for the payment to petitioning creditors in involuntary cases of such fee, but in cases of voluntary bankruptcy it has left the payment of the fee to the court to determine. In other words, an absolute liability is imposed by the bankruptcy act for the payment of attorney's fees to the petitioning creditor and to the bankrupt in involuntary cases, and if in this case the services rendered by the attorney for which the claim is made were performed for the bankrupt while he was performing the duties prescribed by the Bankruptcy Act, then they are allowable and their payment is specifically provided for by the Bankruptcy Act, leaving it to the court only to regulate the amount of such payment and not to decide whether or not the attorney should be paid any sum whatever.

These sections of the bankruptcy act, have been

construed by the Circuit Court of Appeals several times, and in construing the same in *Smith v. Cooper*, 120 Fed. 230, the Honorable Circuit Court of the Fifth Circuit, citing from *in re Curtis* 100 Fed. 785, said:

“The attorneys for the petitioning creditors are entitled to this reasonable fee *as of right*. Its allowance or disallowance is not matter of discretion ----- The amount must in all cases be reasonable, *to be determined upon evidence of the service performed and of its value and in the absence of evidence of its value, by the court from knowledge of its worth.*”

While this was upon the question of the fees for petitioning creditors, it is the construction placed upon this same section and applies equally to the attorney's fees for the bankrupt.

Among the duties imposed upon the bankrupt are the preparation of the schedules. This is unquestionably such a matter as requires the services of an attorney and compensation is allowable therefor, not at the rate of ordinary clerks and accountants, but at the rate charged by attorneys for their services, as the statute provides for the bankrupt employing attorneys and they are to be paid for at professional rates and not at the rate of a clerk or bookkeeper. It seems to us to be clearly erroneous for the court to hold that it is necessary in the preparation of

schedules to use a large amount of work and labor in securing the data in order that the schedules may be properly made out, viz., that the proper description of the property may be given, that its value and details may be given, that all of the other requisites provided by the law may be complied with, and then to say that this is not chargeable for at professional rates. If these services are not to be charged for at professional rates then in such a case as this it would be incumbent upon the attorney, when a large corporation with large and numerous records, is adjudged an involuntary bankrupt, after being out of the possession of its own books for many months and these books in a chaotic condition, to employ a firm of expert accountants to secure this information for the attorney, but we respectfully submit that there is nothing in the bankruptcy law that will warrant an attorney charging for such services and there is nothing in the bankruptcy law that would warrant a court allowing for the services of an expert accountant in doing such work.

Why should not the bankrupt's attorney fees be paid in such cases as this? He is party to the action. He is perhaps the most interested of any party to the proceedings especially in such cases as this where the schedules show assets of more than three quarters of a million dollars, with liabilities a quarter of a million dollars less, showing that if the assets are properly handled that the bankrupt will receive back after the administration of the estate is

closed a large sum of money. Should the bankrupt in such a case, of all persons, not be allowed the right of an attorney to protect its interests in such a proceeding? The law, by the act of bankruptcy itself, has taken from him all of his property and all of his assets. He has nothing left with which to hire an attorney and we think it clear that the very idea of the framers of the bankruptcy law was that in such cases as this, that the bankrupt would be in need of legal services and that as his creditors had taken from him and from his management all of his property and effects and taken from him the only means that he had to employ professional services, that it becomes incumbent upon the court, acting on behalf of the creditors in such cases, to allow the bankrupt from his own property and his own assets sufficient funds with which to pay a reasonable attorney's fee for the professional services actually rendered in performing the duties which the bankruptcy law has itself imposed upon him.

The Honorable District Judge took the position that the bankrupt appeared merely as a witness and that it was simply incumbent upon him to appear and testify in the case. Such a construction as this would thereby result in the bankrupt, the most interested party in the proceeding, appearing for examination by the creditors and their attorneys, by the trustee and his attorney, and he, the bankrupt—being the most interested party in the proceeding—not having the right to legal counsel to protect his



own interest in the proceeding. If the bankrupt is not entitled to an attorney in such cases as this should the trustee be entitled to have an attorney to conduct the examination for him? Why not carry the same idea through the entire proceeding and say that the trustee himself should conduct the examination of the bankrupt in order to find out the condition of the bankrupt's affairs?

The appellants take the position that this is a legal proceeding in a duly recognized court of the United States and that any party to the proceeding should unquestionably be entitled to the right of counsel therein, and it is a well known fact that in such cases as this every person is represented by counsel, including claimants, trustee, petitioning creditors and bankrupt itself, and to say that because the court has taken from the bankrupt all of his property that he shall then have to appear in person without legal assistance while all the other parties are represented by counsel, puts him at an unfair advantage in such a proceeding and takes from him one of the important rights given him by the bankruptcy law, namely, to have the aid of professional services while performing the duties prescribed therein.

There might be occasions when the bankrupt's interest would be running counter to that of the creditors and in opposition to the trustee ~~of~~<sup>or</sup> the bankruptcy law, at which time he would not be entitled to attorney's fees, but in such a case he would not

be performing the duties prescribed in the bankruptcy law but would be performing duties wholly on his own behalf, and we think it is such cases as this that the courts refer to when they say that the bankrupt in involuntary cases is not entitled to attorney's fees in *all* cases. In other words, if the bankrupt is trying to claim property as exempt, but the trustee and creditors believe it is not, and he hires an attorney to protect his interest in the proceeding, this would not be while performing the duties imposed upon him by the bankruptcy law, and we do not think such fees would be allowable to him out of the estate. Again, if he should be trying to conceal property and not divulge its whereabouts to the trustee and would employ an attorney to assist him, this would not be while performing the duties enjoined by the bankruptcy law, and would therefore not be allowable. It might also be questioned whether an attorney's fee upon his application for discharge would be allowable, as there is no requirement in the bankruptcy law requiring him to apply for a discharge, but this is something that is particularly personal to him. Many other illustrations of services rendered by bankrupt's attorney in involuntary cases might be given where the fee would not be allowable, but so far as we are able to learn there is no case cited either in the reports or in the text books wherein attorney's fees have been denied to a bankrupt in involuntary cases where the bankrupt has been required to attend a lengthy session of the court (39 days as shown

by Record pages 72 to 76) by order of the Court and where he has been examined for more than a month about his affairs, and these meetings have not been prolonged by any act of the bankrupt. The written testimony taken on these hearings covered more than 1500 pages, page 51 Record, where the referee certifies pages 1526 to 1540.

Before leaving this phase of the question we wish to particularly call the court's attention to the fact that not one single day of delay was caused by procrastination or prolixity on the part of the bankrupt, as the evidence in this case shows conclusively that the bankrupt at all times tried to expedite matters and tried to get the proceedings closed in order that the first meeting of creditors should come to an end so their attendance would be no longer required. This appears by the testimony presented on behalf of the claimants wherein they testify to such a state of facts and there is no contradiction of it in the record. (Record, pages 35 to 38).

The matter of an attorney and professional services being required on behalf of the bankrupt have been so squarely and favorably decided by every court that has ever passed upon the same that it seems to us that there should be no question on this point, and that the only questions that would be open for determination would be: First, the number of days attendance by the bankrupt and its attorney upon the hearing; Second, the reasonable value of the services per diem to be allowed for such hear-

ings; Third, was there any delay occasioned by the bankrupt, and if so, this should be deducted from the time allowed.

We particularly call the court's attention to the case of *In Re Mayer*, 101 Fed. 695, where Judge Seaman in the District Court of Wisconsin, in construing this statute explicitly said:

"I am of the opinion that the bankrupt is entitled to counsel while undergoing his examination before the referee in respect of his affairs and conduct. Ordinarily this should not require attendance on more than 1 or 2 days. If extended, however, at the instance of the creditors or trustee, without delay needlessly caused by the conduct of the bankrupt in the examination, the time so occupied must be computed in making the allowance."

This matter was squarely up before the honorable District Judge in that case for decision and he so held.

#### Sec. 15. ELEMENTS TO BE CONSIDERED IN ARRIVING AT REASONABLENESS OF FEE.

In our statement, Sections 2 to 8 inclusive, we have stated the nature of the services rendered, Secs. 3 and 4, the time necessarily employed therein, Sec. 5, the amount involved, Sec. 6, the responsibilities assumed, Sec. 7; and the results obtained, Sec. 8.

We have put our statement in this form because



the United States Circuit Court of Appeals, 5th Dis., in the case of *Smith vs. Cooper*, 120 Fed, 231, has cited with approval the case of *In Re Curtis* 100 Fed, 792, which holds that the above mentioned elements "enter into and should control the judgment upon the value of the professional services."

Sec. 16. DECISION OF DISTRICT JUDGE.

Judge Dietrich in his decision says: (Record, p 71).

"It is doubtless true, and it is much to be regretted, that the amount allowed is in any view inadequate reasonably to compensate for the time claimants have actually spent upon this account, but, as was said by Judge Phillips in *In Re Harrison Mercantile Company* (95 Fed. 123), "while the Court personally would be pleased to exercise a spirit of large liberality both towards attorneys and its officers assisting in the administration of bankrupt estates, it must be understood that the court is impressed with a sense of the obligations imposed upon it by the bankrupt act, to so administer it as to preserve both the letter and the spirit of the statute and produce the best results in behalf of creditors," and cites the case *In Re Curtis* 100 Fed, 792, enjoining economy in the administration of the bankruptcy act.

It will be seen that the Judge concedes that the fee he has allowed is "inadequate reasonably to compensate for the time claimants have actually expend-

ed upon this account," and that he in consideration of economy cut the claimants' fee to what was unreasonable.

In connection with this part of the Judge's decision we desire to again call the court's attention to the case of *Smith vs. Cooper*, *supra*, in which the Circuit Court of Appeals said in commenting upon the action of the District Court for the Southern District of Georgia in reducing the attorneys' fees from \$1,000 to \$196.68:

"The master found in consideration of this evidence and for other reasons considered valuable by him, that petitioners were entitled to the sum of \$1,000. In considering the master's report the learned judge seems to concede that for the services actually rendered the amount allowed by the master was not in excess of reasonable fees, but, for the consideration of economy and the necessity of preserving a good portion of the funds recovered for the benefit of the creditors, he considered it proper to reduce the amount recommended by the master and allow only a small percentage, not of the amount actually recovered, but upon the amount left in the hands of the trustee after paying certain costs of the case. While we agree with the learned judge of the bankruptcy court that to aid the parties and under the law there should be an economical administration of the bankrupt's estate, we are unable to concur with him in his reducing the

fee to be allowed applicant in this case.”

We think this case in some respects similar to the one at bar and certainly the reasoning of the appellate court therein is pertinent.

The referee in bankruptcy in consideration of the undisputed evidence before him and all the facts of the case, with which he was acquainted, found that the fees in this case were reasonable. The District Judge “in consideration of economy” and in conflict with the undisputed evidence before the referee and in conflict with the findings of the referee, and having no express testimony on which to base his finding, reduced the fee to a very small amount in this case which he says is “inadequate reasonably to compensate” bankrupt’s attorneys.

#### Sec. 17. DECISION OF JUDGE DIETRICH ON \$100 ALLOWANCE.

The referee allowed \$100 for preparing the objections and brief on the matter in opposition to the claim of L. F. Connolly, receiver in the state court. (Record, p. 41).

The trustees did not desire to push his objections and the attorneys for the bankrupt prepared their brief, urged their objections and reduced the receiver’s claim eleven or twelve hundred dollars which otherwise would have been a prior claim. Judge Deitrich holds that as long as that was the duty of the attorney for the trustee, no compensation can be allowed the attorneys for the bankrupt therefor. In equity and in sound reasoning we do not see why

this amount might not be paid to the attorney for the bankrupt as their acts accrue to the best interest of the creditors, even if it was necessary to deduct the amount from the fees allowed the attorney for the trustee.

Again this was in direct accord with Subdivision 3 of Section 7 of the bankruptcy act which provides among the duties of the bankrupt: "examine the correctness of all proofs of claims filed against his estate."

The creditors having received a great benefit from this service are certainly in poor grace at this time to object to paying a small compensation therefore.

#### Sec. 18. DECISION OF JUDGE DEITRICH ON CLAIM OF \$750.00.

The Judge's reason for reducing this amount seems to be based upon the fact that he considered the matter of preparing the schedules almost altogether a matter of clerical work. The undisputed testimony shows that the stenographer's charges alone for preparing the schedules would be worth \$75. The undisputed testimony and finding of the referee who had all the facts before him held that the work of the attorneys was not of a clerical nature and that it was reasonably worth \$750. The learned Judge says: Insofar as we are advised by the record the present case is no great exception to the general rule insofar as the reasonable services are concerned. It is indeed difficult to see how any difficult or intri-



cate questions would be involved in such a case." The learned Judge, however, does not say there was any evidence in opposition to the finding of the referee or in conflict with the testimony introduced at the hearing before the referee on the allowance of attorney's fees. It is apparent that the Judge considers a charge of \$750 very large, but without any evidence to base his opinion thereon and "in consideration of economy" he reduces the fee to \$285.

It seems to us that the honorable Judge throughout his decision bases his findings upon simple conclusions which were in direct conflict with the evidence before him and also the findings of the referee.

In commenting upon the trouble the petitioners had in obtaining the books, the learned Judge says:

"The receiver was an officer of this court and if he was, either in good faith or bad, withholding the books from the inspection of the bankrupt, I must assume that upon the most informal application to the referee an order would have been made requiring him, under proper conditions, to give access to the books."

The facts and the testimony show positively and the referee so held that the most informal application to the referee did not produce the books and that it was absolutely necessary to make written application and to obtain an order from the referee before the books could even be seen by the bankrupt.

## Sec. 19. ATTENDANCE OF ATTORNEYS AT MEETING OF CREDITORS.

In direct conflict with the undisputed testimony and with the findings of the referee that it was necessary for the attorneys of the bankrupt to attend the meetings of creditors, the judge says:

“While contingencies doubtless may arise doubtless may arise where the assistance of counsel may be reasonably required, it is thought that there is no presumption of such need and that ordinarily attorney’s fees for such services are not chargeable against the estate \* \* \* He has no obligation except to disclose facts within his knowledge \* \* \* and there is ordinarily no more reason why he, as a witness, should have the protecting care of attendant counsel than that any other witness under any other circumstances should have such protection. \* \* \* Ordinarily why should not bankrupt put himself at the service of the trustee, who is presumably not antagonistic, and who should not, and presumably does not have any motion or incentive to injure him or prejudice him in any of his rights?”

The learned Judge did not attend any of the meetings of the creditors, did not know, as did the referee, that many of the creditors and trustee at times were very antagonistic towards the bankrupt and its officers and did not know that there was a

disposition throughout all of the hearings on the part of some, if possible, to make the bankrupt appear criminally guilty, but the referee in bankruptcy was present at these hearings, knew and saw the witnesses on the stand, was aware of the feeling that existed between the different creditors and the trustee and bankrupt, understood what need the bankrupt and its officers had of counsel, and in the presumption of such knowledge ordered and required that your petitioners as bankrupt's attorneys should attend all of the meetings. It seems hardly fair simply because the Judge thinks that in the ordinary case the bankrupt does not need counsel that in this case such services of the attorneys were not necessary, when there is a specific finding on the part of the referee that such services were absolutely necessary and that he ordered the same.

In ~~connection~~<sup>conclusion</sup>, as a matter of public policy, we urge that the attorneys for bankrupt be allowed a reasonable compensation. We submit that there was evidence to support all of the referee's findings and that the conclusions reached by the District Judge were in conflict with the undisputed testimony of the witnesses on the hearing before the referee in bankruptcy and in conflict with the specific findings of the referee in bankruptcy, and that no matter how meritorious the judge's recommendations may be as to the consideration of economy in the administration of the affairs, that it is in behalf of public poli-

cy that reputable lawyers be employed by the bankrupt and that they be paid a reasonable fee. If the Judge's decision holds in this case we submit that no reputable lawyer, living on his income as a lawyer, can become the attorney for bankrupts and that the administration of bankrupt estates will, in the future be greatly retarded for the reason that no competent or reputable lawyer will have anything to do with the same.

In recapitulation, appellants respectfully submit:

1st. That all the services performed by them on behalf of said bankrupt were services preformed for said bankrupt while it was engaged in performing the duties prescribed and imposed upon it by the Bankruptcy Act, namely, the preparation of schedules in detail, provided for by said Bankruptcy Act, the examination of the claims of creditors imposed by the Bankruptcy Act, and the attendance upon the first meeting of creditors as required by the Bankruptcy Act.

2nd. That under Section 64b, subdivision 3, that the payment of a reasonable attorney's fee for the professional services actually rendered the bankrupt in involuntary cases, while he is performing the duties prescribed by the Bankruptcy Act, is imposed as a matter of right, and it is not a question of actual necessity or a matter within the discretion of the court, but is a right given the bankrupt by the bankruptcy law and for which compensation must be made out of the estate.



3rd. That each and every of the acts performed by the bankrupt's attorneys and for which a claim is made in this review, were performed and necessarily performed, for the bankrupt while it was performing the duties prescribed, namely, the preparation of the schedules which is imposed upon him by the bankruptcy law and the attendance of the meeting of creditors which is imposed upon him by the bankruptcy law, and that your petitioners are entitled to a reasonable attorney's fee for each and all of said services to be determined upon by the basis of professional services actually rendered, and that includes a reasonable fee under the facts as shown in evidence for preparing the schedules, a reasonable fee for examining the claim of Lawrence F. Connolly and expunging a large amount thereof, a reasonable per diem for attending the first meeting of creditors the thirty-seven days for which compensation is claimed.

We respectfully submit to this honorable court that the Honorable District Judge erred in refusing to allow a reasonable compensation for these services and that his order in so doing should be reversed and the order of the Honorable Referee allowing appellants a reasonable compensation for such services should be approved by this court, in order that justice might be done in the premises, and your petitioners receive a reasonable attorney's fee for the professional services actually rendered the bankrupt in involuntary bankruptcy proceedings while perform-

ing the duties prescribed by the bankruptcy law as authorized and required by Section 64b, subdivision 3, of the Act of Bankruptcy.

EZRA R. WHITLA,

R. S. NELSON,

Residence and P. O. Address, Coeur d'Alene, Idaho;

In Proper Person.

GRAVES, KIZER & GRAVES,

Residence and P. O. Address, Spokane, Wash-  
ington; Of Counsel.

United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

WHITLA & NELSON,

Petitioner.

v.

SAMUEL L. BOYD, as Trustee in Bankruptcy of  
THE LANE LUMBER COMPANY, LIMITED,  
a Corporation Bankrupt, and L. C. WILSON,  
RECEIVER OF THE STATE BANK  
OF COMMERCE OF WALLACE, IDAHO,  
Respondents.

In the Matter of THE LANE LUMBER COMPANY,  
LIMITED, a Corporation, Involuntary  
Bankrupt.

---

On Petition for Revision From the United States  
District Court for the District of Idaho,  
Northern District.

---

**Motion to Dismiss Petition for (Review) Revision.**

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E. N. LA VEINE,  
Attorney for Respondent, Trustee.  
Coeur d'Alene, Idaho,

JOHN H. WOURMS,  
Attorney for Respondent, State Bank of Commerce,  
Wallace, Idaho,





THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.

WHITLA & NELSON,

Petitioner.

v.

SAMUEL L. BOYD, as Trustee in Bankruptcy of  
THE LANE LUMBER COMPANY, LIMITED,  
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In the Matter of THE LANE LUMBER COMPANY,  
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On Petition for Revision From the United States  
District Court for the District of Idaho,  
Northern District.

---

**Motion to Dismiss Petition for (Review) Revision.**

---

**MOTION.**

Now comes Samuel L. Boyd, trustee of the Lane Lumber Company, Limited, a corporation, bankrupt, and L. C. Wilson, Receiver of the State Bank of Commerce of Wallace, Idaho, the designated Respondents in the foregoing proceedings, and hereby make a special and limited appearance for the sole purpose of moving to dismiss the Petition for (review) Revision filed by Whitla & Nelson, Petitioners, for the following reasons:

The petitioners seek to have revised:

A QUESTION OF LAW, whether the trustee

by not appearing at the hearing on the bankrupt's attorney's fees, waived his objections to said claim, or was required by law to file exceptions to the allowance of said claim in the sum of \$2750, (Trans. p. 7) in addition to filing the petition for review of the referee's order which set forth the trustee's assignment of error. (Tran. p. 44). Also

A QUESTION OF FACT, whether the District Judge erred in reducing Petitioner's attorney's fee from \$2750 to \$385, for services as attorneys for the bankrupt. Our grounds for dismissal are:

1. That the said petition presents a question of law, within the revisory jurisdiction, and a question of fact within the appellate jurisdiction of the Circuit Court of Appeals.

2. Appeals cover both questions of law and fact but revisions permit the presentation of only questions of law.

3. That petition for Revision is not the proper method to bring both of the above questions before the Circuit Court of Appeals; no error of law could be predicated upon the reduction, because it was made upon evidence from which men of different minds might draw different conclusions. An issue of this nature is a question of fact, reviewable by appeal and not by Petition for Revision.

Notice is hereby given that this motion will be

called up for hearing on the 13th day of February, 1914, at 10:00 A. M., or as soon thereafter as counsel can be heard. This motion will be made and based upon petition and transcript of the record filed and served upon the above designated Respondents.

Dated January 10th, 1914.

E. N. LAVEINE  
Attorney for S. L. Boyd, Trustee.

JOHN H. WOURMS  
Attorney for State Bank of Commerce.

### ARGUMENT.

When this motion is presented the attorney for the trustee will be charged with being extremely technical and the echo will be heard from the Golden Gate to the virgin forests of Idaho.

Now let us see what has happened in these proceedings.

On December 11, 1912, the petitioners filed with the referee, Lawrence L. Lewis, before whom the Lane Lumber Company Bankruptcy proceedings are pending, their petition for "allowance of attorney's fees as bankrupt's attorneys." (Trans. p. 5).

To said petition, on April 5, 1913, objections were filed by L. C. Wilson, Receiver of the State Bank of Commerce of Wallace, Idaho, the largest unsecured creditor of the bankrupt holding a claim in the sum of about \$200,000; also by the Bank of California, next to the largest unsecured creditor of

the bankrupt holding a claim in the sum of about \$100,000, both of which claims had been allowed prior to the filing of said petition. Both of these creditors were represented by able counsel. (Trans. p. 18 to 20).

An order was made by the referee, and notice given to creditors, setting the hearing on said petition, with other matters, which was had on March 26, 1913. (Trans. p. 23).

The trustee, and his attorney, naturally knew of the great interest the Bank of Commerce and the Bank of California were taking in said matter; being desirous of saving the estate all unnecessary expense possible they decided to permit the parties who had objected to the allowance to settle the matter, in so far as the referee was concerned.

On said date the hearing was had and on May 19, 1913, the said referee made an order allowing the attorneys for the bankrupt every cent claimed, to-wit, \$2750. (Trans. p. 39).

Something had happened and the trustee and his attorney saw, that notwithstanding their policy of economy, they would have to take a hand in the matter.

On May 28, 1913, the undersigned attorney for the trustee prepared, and secured the joinder of the State Bank of Commerce in, the petition for review,



of said allowance, before the Federal Judge, Hon. F. S. Deitrich. (Trans. p. 43 to 48).

The matter was certified to said Judge and argued. Thereafter on July 7, 1913, he rendered his decision reducing said claim from \$2750 to \$385, 206 F. 780.

#### AS TO THE PURPORTED QUESTIONS OF LAW, TRANSCRIPT p. 7.

Section 2, Clause 10 and Gen. Ord. No. 27, do not contemplate nor require that the "bankrupt, creditor, trustee," or other person who shall desire a review by the judge of any order made by the referee shall appear before the referee in person when the proceedings are had. If the petitioner is willing to rely upon the referee's record, for use before the district judge, and files his petition within 10 days he has done everything the Bankruptcy Act contemplates.

The statute and general orders do not require exceptions to be filed as a basis for the petition for review. In the absence of a rule or order of court requiring exceptions to be filed, it is not necessary to do so. There is no rule or order of court requiring exceptions to be filed in the District of Idaho.

Loveland on Bankruptcy, 4th Ed. Vol. 1, § 94 p. 224.

This court does not take judicial notice of District Court rules.

The foregoing, covered by petitioner's first assignment of error, are the only purported law questions involved.

"It may be said generally that the exercise of the personal discretion of a court does not present a question of law, and, therefore, cannot be reviewed by an appellate court in the absence of gross abuse of such discretion.

Matters of practice in the court of bankruptcy, not regulated by statute or the general order, are generally within the discretion of the court and its action in such matters is not reviewable on petition."

Loveland on Bankruptcy, *supra*, Vol. 2, § 812, p. 1428.

"The respondent's objection that the order cannot be reviewed because no exception was taken at the time is not well founded in law. While the course pursued by the trustee and the objecting creditor in not appearing and resisting the claim at the hearing before the referee cannot be commended, it is thought that formal exceptions are not essential to the right of review. The general rule, with its qualifications, is correctly stated in Collier on Bankruptcy (9th Ed) p. 609, where it is said:

"A referee's findings of facts may be reviewed,

although no formal exceptions to his decisions are filed, where such filing is not required by a rule or order of the court. The court will not ordinarily consider for the first time questions not raised below, or issues not presented by the record; if a point is presented by the record the District Court may consider it although it was not discussed before or by the referee. The court is not barred by or confined to the matters certified by the referee; under its broad general powers it may consider any point presented by the record."

See, also, "Loveland on Bankruptcy, Vol. 1, § 94, and 95."

District Judge's Decision, Trans. p. 56 and 57, 206 F. 780-781-782.

AS TO THE QUESTIONS OF FACT,  
TRANSCRIPT pp. 7, 8 & 9.

Pages 49 to 56, of petitioners Transcript of Record, sets forth the papers and records delivered to the District Judge which were before him at the time of argument; observe on page 55: "2. Record of Proceedings, pages 1 to 1540, both inclusive."

As a matter of fact all of the typewritten record of the proceedings had before the referee were before the District Judge. The testimony in the Trans. pp. 23 to 40 does not disclose whether or not these are

the pages of the record included in the report of the referee to the District Judge.

Where are the portions of the record disclosing that the petitioners were present on the dates set forth in the "Statement of Meetings" set forth on pages 72 to 80 of the Petitioners Transcript of Record? The record does not disclose whether these meetings were adjourned or occupied the full day. It is apparent that said statement is no criterion by which to prove the dates that bankrupt's attorneys were in court, nor do they claim that they were present on each of said dates set forth therein. Compare Trans. pp. 16, 17 & 18 with pp. 72, 73, 74, 75 & 76.

The Trustee and the Receiver of the State Bank of Commerce, by their petition for Review, before the District Judge, raised only questions of fact. (Trans. pp. 43 to 48). We contended, among other things, to illustrate, in paragraph 6 of our assignments of error, transcript page 46, that petitioners were not present 37 days at hearings, that on certain dates set forth in said objection no meeting of creditors were had and no appearance made by said attorneys on behalf of the bankrupt, reciting that on other dates adjournments were taken immediately or that only  $\frac{1}{2}$  day sessions were held.

Permit us to refer to the decision of the Dis-



trict Judge, 206 F. 780-785. *supra*. "Unfortunately there is wanting definite information touching one, if not the most important, factor entering into the consideration of the amount to be allowed upon this account, and that is the time which was actually and necessarily spent. If there were any assurance of more specific data upon the subject I would be inclined to refer the matter back for further testimony, but apparently no account was kept and nothing better than the general estimate of the claimants, testifying from memory, is available."

The respondents do not contend, nor could they, that the bankrupt's attorneys are not entitled to reasonable fees for their services rendered. The Bankruptcy Act settles that question.

What does this matter present to this court for consideration?

The only significant question petitioners are endeavoring to have settled is the amount of fees. The trustee and receiver contended that \$2750, allowed by the referee, was excessive, the District Judge agreed with them and reduced it to \$385. The amount of fees is a question of fact and not one of law. Only law questions can be presented by petition for revision.

The Circuit Court of Appeals is entitled to the Record, if it be asked to pass upon questions of fact,

and the estate to the benefits of an appeal bond, as a much larger record is necessarily required and contemplated in the review of questions of fact than in the revision of questions of law. In the present Petition for (Review) Revision the appellate court is not provided with all the facts upon which the District Court predicated its decision, nor has an appeal bond been filed for the protection of the said estate, although both of these acts are contemplated and provided for in all cases in which an appeal is taken.

It is difficult to perceive how error of law could be predicated on the District Judge's decision, because it is made upon evidence from which men of different minds might draw different conclusions, and a question of this nature is a question of fact reviewable by *appeal* and not by *petition* for revision.

"A decision of a court of bankruptcy allowing or rejecting a claim of \$500 or over *is reviewable by the Circuit Court of Appeals only upon an appeal taken within 10 days* as provided by Bankruptcy Act, July 1, 1898, c. 541, § 25a, 30 Stat. 553, (U. S. Comp. St. 1901, p. 3432)."

*Postlethwaite v. Hicks* 165 F. 897 C. C. A. 4th Circuit, 1908.

"On a petition in bankruptcy to superintend and revise, the appellate court can review only questions

of law and *cannot disturb the trial court's findings of fact.*"

In re Irwin et al, 174 F. 642. C. C. A. 3rd Circuit. 1909.

"We cannot determine questions of fact involved in the finding or order sought to be reviewed."

In re Stewart 179 F. 222-228. C. C. A. 6th Circuit, 1910.

"Disputed questions of fact cannot be reviewed on a petition to revise authorized by Bankruptcy Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901. p. 3432.)"

In re Witherbee 202 F. 896 C. C. A. 1st Circuit, 1913.

We respectfully submit that the petition for (review) revision should be dismissed, the transcript of the record in support thereof should be stricken, and the District Judge affirmed.

Dated January 10th, 1913.

E. N. LA VEINE,

Attorney for Respondent, Trustee,

Residence Coeur d'Alene, Idaho.

JOHN H. WOURMS,

Attorney for Respondent, State Bank of Commerce,

Residence Wallace, Idaho.

We received a copy of the foregoing motion on

this .....day of February, 1914, at Coeur d'Alene,  
Idaho.

.....  
Attorneys for Petitioners.



United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

WHITLA & NELSON. Petitioner,  
v.  
SAMUEL L. BOYD, as Trustee in Bankruptcy of  
THE LANE LUMBER COMPANY, LIMITED,  
a Corporation Bankrupt, and L. C. WILSON,  
RECEIVER OF THE STATE BANK  
OF COMMERCE, of Wallace, Idaho,  
Respondents.

---

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Involuntary Bankrupt.

---

On Petition for Revision from the United States District Court for the District of Idaho, Northern Division.

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**BRIEF OF RESPONDENTS.**

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E. N. LA VEINE,  
Attorney for Respondent, Trustee,  
Coeur d'Alene, Idaho,  
JOHN H. WOURMS,  
Attorney for Respondent, State Bank  
of Commerce, Wallace, Idaho,



THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.

---

WHITLA & NELSON.

Petitioner,

v.

SAMUEL L. BOYD, as Trustee in Bankruptcy of  
THE LANE LUMBER COMPANY, LIMITED,  
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RECEIVER OF THE STATE BANK  
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In the Matter of THE LANE LUMBER COMPANY,  
LIMITED, a Corporation, Involuntary  
Bankrupt.

---

On Petition for Revision from the United States  
District Court for the District of Idaho,  
Northern Division.

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Without waiving the special and limited appearance made herein, for the purpose of moving to dismiss the petitioner's petition for (review) revision, the designated respondents submit the following brief.

STATEMENT OF THE CASE.

Petitioners claim \$2750 for acting as attorneys for the officers of the Respondent. \$2750 was allowed by the referees, which was reduced to \$385 by the District Judge. (Trans. p. 56), 206 F. 780.

ARGUMENT.

Petitioners in their brief do not specify the 1st

assignment of error set fourth in their Petition for (review) Revision. which was the only *matter of law* involved herein. (Trans. p. 7).

However, the assignment is discussed and shown not to be well taken in Respondent's MOTION TO DISMISS PETITION FOR (REVIEW) REVISION, pp. 6 to 8 inclusive.

The record before this court is so incomplete that it is an impossibility for this tribunal to intelligently review the decision of the District Judge who had the complete record. (Trans. p. 55), (Brief of Petitioners p. 34).

The record of the evidence in this proceeding has not been stipulated to by the parties, nor settled by the district judge.

Petitioners are asking this court to consider only that portion of the record which is favorable to them. (See Motion, *supra*, pp. 8 to 12.)

Immediately after the insolvency of the bankrupt everything was done by its officers to make it appear as though the real and personal property of the bankrupt was far in excess of its actual value. The schedules prepared by the officers of the bankrupt disclosed its assets to be \$771,201.50. (Brief of Petitioners p. 8.)

During the course of the administration, and as required by the Bankruptcy Act, the trustee filed his



Inventory and subsequently three (3) appraisers were appointed to appraise the real and personal property of the bankrupt. Upon the filing of the appraisers' report the value of the bankrupt's estate was disclosed to be \$217,996.63. (Brief of Petitioner p. 10).

The trustee, feeling that some grave error had crept either into the schedules or into the report, applied to the referee for a hearing, after notice to the creditors, for the purpose of examining the officers of the bankrupt and the appraisers in order to enable the referee to intelligently approve or disapprove the report and discharge the appraisers.

The hearing was had on the 3rd day of January, 1912. The appraisers proved conclusively that the true value of the bankrupt's real and and personal property was \$217,996 63. It will be observed, as an absolute and indisputable fact, *that none of the officers of the bankrupt requested to nor did they place any witnesses on the stand to prove that the value of the assets of the bankrupt were \$771,201.50, as disclosed by the bankrupt's schedules.* The referee approved the appraisers' report after the hearing.

Counsel have used considerable space in explaining to the court the complicated condition for the affairs of the Lane Lumber Company.

Several examinations were held for the purpose

of getting reliable information from the officers of the bankrupt. Repeatedly, instead of answering the questions propounded to them, the officers would either say that they did not know or that they had forgotten.

In the matter of determining the correctness of the allowance of \$2750 to the attorneys of the bankrupt, we contend that the *creditors and this court are entitled to a complete and accurate record.*

In our petition to review the order of the referee allowing \$2750. we state, paragraph six (6), (Trans. p. 46), "that the record in this proceeding shows that the attorneys for the bankrupt did not appear and take part in the hearing of this proceeding thirty-seven (37) days; that on the following dates, for which \$50 per day was allowed, no hearing or meeting of creditors was had and no appearance made by said attorneys on behalf of said bankrupt, to-wit:

August 26, 1911 ..... 5 days;

October 10, 1911 ..... 1 day;

January, 12, 1912..... 1 day;

February 27, 1912..... 1 day;

May 2, 1912..... 1 day;

July 16, 1912 ..... 1 day;

November 25, 1912..... 1 day;

---

Total..... 11 days."

The trustee in his brief before the District Judge, who had the complete record of the proceedings, which were had before the referee, said:

"In order to prove to the court that my statement is correct I want to make reference to the record.

Aug. 26, 1911,	1st meeting	9-7-11.	Record p.	1
Oct. 10, 1911,	Convened on	9-27-11	Record p.	179
	Adjourned to	10-23-11	Record p.	181
	Convened on	10-23-11	Record p.	182
Jan. 12, 1912,	Convened on	1-13-12	Record p.	600
	Adjourned to	2-12-12	Record p.	710
	Convened on	2-12-12	Record p.	710
Feb. 27, 1912,	Convened on	2-24-12	Record p.	767
	Adjourned to	4-10-12	Record p.	792
	Convened on	4-10-12	Record p.	793
May 2, 1912,	No appearance		Record p.	808
July 16, 1912,	Convened on	7-15-12	Record p.	1183
	Adjourned to	7-26-12	Record p.	1194
	Convened on	7-26-12	Record p.	1195
Nov. 25, 1912	No hearing had from	Nov. 12, 1912,		
		to March 26, 1913,	pp.	1466-1467."

Naturally this court is interested in ascertaining the customary amount of fees which have been allowed by Federal Courts for similar services and the grounds upon which they were predicated.

In *re* Curtis et al, decided by the Circuit Court

of Appeals in 1900, 100 F. 784, 41 C. C. A. 59, contains an able discussion on attorney's fees. It was in this decision that the court said:

"It becomes us, therefore, to inquire with respect to the matter in hand concerning the character and value of the service rendered, and of the grounds upon which the allowance was predicated. The elements which enter into and should control judgment upon the value of professional services we think to be these: *The nature of the services, the time necessarily employed therein, the amount involved, the responsibility assumed, and the result obtained.*"

#### CUSTOMARY ALLOWANCE FOR DRAFTING SCHEDULES FROM \$25 to \$50.

In re Meyer 101 F. 695, 697 (D. C. E. D. W.)

In re O'Hara 166 F. 384 (D. C. M. D. Pa.)

In re Christianson 175 F. 867, 869 (D. C. N. D.)

#### CLERICAL WORK.

In re Connell & Sons 120 F. 846, (D. C. N. D. Pa.)

#### CUSTOMARY ALLOWANCE FOR ATTEN- DANCE IN BANKRUPTCY COURT, WHEN PERFORMING DUTIES, UNDER THE BANKRUPTCY ACT, IS FROM \$10 TO \$25 PER DAY.

In re Meyer 101 F. 695, 697 (D. C. E. D. W.)

In re Christianson 175 F. 867, 869, (D. C. N. D.)

In the following table we have tabulated all the



obtainable cases showing the FEES CLAIMED  
AND AMOUNT ALLOWED, AND FEES DIS-  
ALLOWED BANKRUPT'S ATTORNEYS.

Claimed:	Allowed:
\$ 250.00	\$ 50.00 in re Beck 92 F. 889, 893 (D. C. S. D. Iowa E. D.)
75.00	\$ 25.00 In re Carolina Cooperage Co. 96 F. 950 (D. C. E. D. N C.)
250.00	100.00 In re Burrus 97 F. 926, 927 (D. C. W. D. Va.)
90.00	90.00 In re Anderson 103 F. 854, 859 (D. C. D. S. C.)
524.00	271.00 In re Brundin 112 F. 306 (D. C. D. M. S. D.)
150.00	100 00 In re Connell & Sons 120 F. 846 (D. C. M. D. Pa.)
3000.00	200.00 In re Goldville Mfg. Co. 123 F. 579, 586 (D. C. S. C.)
150.00	75.00 In re Lang 127 F. 755 (D. C. W. D. T.)
250.00	50.00 In re Covington 132 F. 884 (D. C. E. D. N. C.)
600.00	50.00 In re Felson 139 F. 275, 280 (D. C. N. D. N. Y.)
150.00	50.00 In re Christianson 175 F. 867 (D. C. D. N. C.)

50.00 In re Stratmeyer

14 A. B. R. 120 (D. C. H. I.)

50.00 In re Kross

96 F. 816 (D. C. S. D. N. Y.)

50.00 In re Smith

108 F. 39, 41 (D. C. E. D. N. C.)

75.00 In re Ellett Electric Co.

196 F. 400 (D. C. W. D. N. Y.)

### DISALLOWED.

In re Woodward 95 F. 955, 956 (D. C. E. D. N. C.)

In re O'Connell 98 F. 83 (D. C. S. D. N. Y.)

In re Terrill 103 F. 781 (D. C. D. V.)

In re Rosenthal &

Leham 120 F. 848 (D. C. E. D. Mo. E. D.)

In re Linden & Bro

v. Smith 135 F. 43 (C. C. A. 5th C.)

### NOW AS TO THE ATTENDANCE BY BANKRUPT'S ATTORNEYS.

"Ordinarily I cannot regard attendance by counsel for bankrupt at all the various examinations as necessary. The restraints on discharge being confined to acts either criminal or most plainly fraudulent and wrong, the honest and straightforward debtor has rarely need of 'counsel,' unless falsely attacked, when professional aid may become proper and necessary, and should then be compensated. *There is often, however, too much interference and ob-*

*jections by the bankrupt's attorneys in the ordinary examinations in behalf of creditors, which operates in every way injuriously."*

In re Kross 96 F. 816-819 (D. C. S. D. N. Y.)

The allowance made by the referee to the attorneys for the bankrupt when learned of by the attorney for the trustee caused him to commence to scrutinize the allowance. As far as the services rendered by bankrupt's attorneys are concerned they are devoid of any complexity or unusual intricacies of practice. For preparing the schedules and attending hearings in the bankruptcy court the attorneys for the bankrupt want a fee of \$2750. Lack of experience is the only thing which would prompt a lawyer to seriously insist upon such an enormous, inordinate and outrageous allowance for the services rendered. The District Judge allowed \$385.

We respectfully submit that the decision of the District Judge should be affirmed.

E. N. LAVEINE,  
Attorney for Respondent, Samuel  
L. Boyd, Trustee,  
Coeur d'Alene, Idaho.

JOHN H. WOURMS,  
Attorney for Respondent, State  
Bank of Commerce,  
Wallace, Idaho.

Copy of foregoing brief received this.....day  
of February, 1914.

.....  
Attorney for Petitioner.



---

No. 2336

United States

Circuit Court of Appeals

For the Ninth Circuit

---

WHITLA & NELSON, a Copartnership, Attorneys  
for the LANE LUMBER COMPANY, a Corporation, Bankrupt.

Petitioner

vs.

SAMUEL BOYD, Trustee in Bankruptcy of the  
Lane Lumber Company, a corporation, Bankrupt, and L. C. WILSON, Receiver of the State  
Bank of Commerce of Wallace, Idaho,

Respondents.

---

IN THE MATTER OF THE LANE LUMBER  
COMPANY, A CORPORATION, BANKRUPT

---

BRIEF OF PETITIONERS ON MOTION  
TO DISMISS

---

EZRA R. WHITLA,  
RALPH S. NELSON,  
In Proper Person.  
Residence and P. O. Address,  
Coeur d'Alene, Idaho.  
Attorneys for Petitioners.

GRAVES, KIZER & GRAVES,  
Residence and P. O. Address,  
Spokane, Washington,  
Of Counsel



No. 2336

United States

# Circuit Court of Appeals

For the Ninth Circuit

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WHITLA & NELSON, a Copartnership, Attorneys  
for the LANE LUMBER COMPANY, a Corporation, Bankrupt.

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Respondents.

---

IN THE MATTER OF THE LANE LUMBER  
COMPANY, A CORPORATION, BANKRUPT

---

## BRIEF OF PETITIONERS ON MOTION TO DISMISS

---

The respondents have filed herein a motion to dismiss this petition upon three grounds:

1. That the petition presents both a question of law for revision and a question of fact, which should be appealable.

2. That the appeal covers questions of law and fact and that revisions permit only questions of law.

3. That the petition for review is not the proper method to bring both the above questions before the Circuit Court of Appeals; no error could be predicated upon the reduction, because it was made upon evidence from which men of different minds might draw different conclusions. An issue of this nature is a question of fact reviewable by appeal and not by petition for review.

The sole trouble with respondents is that they do not understand the questions before the court and are in error upon the entire premises.

FIRST, the petition for revision in this case is based squarely upon *issues of law*. We are not asking the court to review any findings of fact whatever but are asking the court to review the conclusions of law, and that alone.

SECOND, there are no issues of fact in this case and the District Judge *did not* make any decision upon any *controverted issues of fact*, but based his decision in this case wholly upon the law, and it is upon his construction of the law that this appeal is taken.

THIRD, the findings of fact in this case were those made by the referee upon *uncontroverted evidence*.

FOURTH, The allowance sought by petitioners was not a claim or debt within the meaning of Section, 25a, subdivision 3, but was a cost of administration and reviewable under the provisions of Section 24b.

## RESPONDENTS' AUTHORITIES

We have no complaint to make with the authorities cited by respondent other than to say they have no bearing upon the facts in this case. The case of *Postlethwaite v. Hicks*, 165, Fed. 897, was a case clearly within Section 25a, and, therefore, subject to appeal and not to review, and in that case it was a claim or debt incurred before bankruptcy and therefore appealable only under the bankruptcy act.

In *Re Irwin et al*, 174 Fed. 642, In *Re Stewart* simply decide that which we do not dispute, namely, 179. Fed., 222, and in *re Witherbee*, 202 Fed. 896, that upon a matter of review this Honorable Circuit Court passes only upon questions of law and does not pretend to decide disputed questions of fact, and we are not asking that to be done in this case.

It is our contention here that this is a controversy arising in the administration of a bankrupt estate and is reviewable under section 24b, and that the bill of petitioners is not a claim or debt within the meaning of section 25a as construed by the United States Supreme Court and also by the Circuit Court of Appeals. It is our contention that the claim or debt there referred to, which gives the jurisdiction for the appeal, is a claim or debt which is provable against the estate of the bankrupt upon him being adjudged such. *Holden v. J. S. Stratton, Trustee*, 191 U. S. 115, 48 L. ed., 116.



in which the Supreme Court of the United States says as follows:

“And while the word “claim” is used in its signification of the demand or assertion of a right in sub. 11 of par. 2, in respect of “all claims of the bankrupts to their exemptions,” it is also used in many parts of the act, and, as we think, in par. 25, as referring to debts (which by subsec. 11 of par. 1 include “any debt, demand or claim provable in bankruptcy” *presented for proof against estates in bankruptcy.*”

In this case it appears that the claim referred to in the third subdivision of Sec. 25a as a debt or claim of \$500 or over, means a debt or claim owing by the bankrupt at the time of his adjudication and which is provable against his estate as such.

The words “debt” and “claim” are usually used in the Bankruptcy Act as meaning a debt or claim existing at the time of bankruptcy and something which is then due and owing by the bankrupt and for which an account may be proven against his estate. Section 57 of the Bankruptcy Act provides for the proof and allowance of claims and by a reading of that section of the statute it is plain that the claim mentioned in section 25a, sub. 3, and the filing of proof of which is provided for by section 57 of the Act, and for which the Supreme Court of the United States has, by forms numbered 31 to 37, inclusive, provided for the proper manner of presenting them to the court for allowance, is the claim or debt refer-

red to in Sec. 25a, sub. 3. Again, the *claims* referred to in Sec. 57 are also barred if not filed within one year after the adjudication., sec 57, subdivision N. The allowance sought by petitioners comes under an altogether different provision and comes under that part of the Act providing for the handling of estates, and section 64, subdivision 3, provides for the payment of the *costs of administration*, and these are payable not as a debt or claim, but as a cost of administering the estate, and no form for proving such an allowance is required or provided for by the Bankruptcy Act, and we think it clear that such costs of administration are not included with the words "claim" or "debt," for which the method of appeal is provided by section 25, subdivision 3.

The Circuit Court of Appeals for the Sixth Circuit so speaks of this section and has so specifically held:

*W. J. Davidson & Co., v. Friedman*, 140 Fed 853

This case is short and direct to the point and is especially valuable because the Honorable Justice Lurton delivered the opinion. In that case it was an *appeal* allowing expenses of administration and the court held that it was not appealable under section 25a, par 3, but was only subject to be brought up by review under section 24b, and said as follows:

"The matter involved in the present appeal is an expense incurred by the trustee in the course of his administration. *It was not a debt*

*against the bankrupt, and had no existence before adjudication.* It was therefore one of that class of matters over which this court is given supervisory jurisdiction to “review in matters of law the proceedings of the several inferior courts of bankruptcy,” within this circuit. In the case of *In re Mueller*, 135 Fed. 711, 715, 68 C. C. A. 349, 353, we said: “The ‘proceedings’ reviewable are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate which are not made specially appealable under section 25a 30, Stat. 553 (U. S. Comp. St. 1901, p. 3432).

The court thereupon dismissed the appeal holding that the appeal was not a proper remedy to review costs of administration.

## QUESTION OF LAW PRESENTED FOR REVIEW

As stated in our original brief in this case the questions herein are *questions of law* involving the construction of Section 7 of the Bankruptcy Act and section 64b, subdivision 3 of that Act, it being the contention of petitioners that they are entitled, *as a matter of law*, to have their fees allowed on the basis of professional services for the preparation of the schedules. Judge Dietrich refused to allow for these services on the basis of professional services, but allowed for them on the basis of clerical work. (Record. (p. 65, where he states as follows:

“For the labor of gathering together and classifying the data I shall allow compensation as for the *services of an accountant*, at the rate of \$15.00 per day for ten days.”

This raises a direct question of law as to whether or not the bankrupt in employing counsel to perform the duties required by the Act is entitled to charge therefor at professional rates or at clerical rates. This does *not* involve a *question of fact*, but does involve only a question of law.

Again, Judge Dietrich holds that petitioners did spend at least a large part of the time for which we claim compensation attending meetings of creditors. (p. 69 of record where he says as follows:

“It is doubtless true that the claimants have spent at least a large part of the time in attending the bankruptcy proceedings for which they claim compensation.” He then states that he does not base this upon a question of the number of days and does not take this into consideration, and says, after allowing \$100 for attending one meeting one particular day: “In that view it becomes unnecessary specifically to find upon the issues whether the attendance covered thirty-seven days, as contended for by the claimants, or only 30 days as asserted by the trustee. *Nor need we determine what would be a reasonable per diem allowance for such attendance, taking into consideration the actual amount of time spent upon each of the several days and the character and scope of the business then under consideration.*” In other

words the learned District Judge held, *as a matter of law*, petitioners were not entitled to a per diem compensation while attending the meetings of the bankruptcy court, but appellants contend that, *as a matter of law* they are entitled to reasonable compensation, per diem, for attending these meetings and that the learned District Judge erred in refusing to make such allowance.

Appellants also contend, *as a matter of law*, that they were entitled to an allowance for contesting the Connolly Claim. In the assignments of error herein it will be noticed that there is not an assignment of error attacking any finding of fact, neither is it being asked in this hearing that any finding of fact be set aside but this petition for review is being presented squarely upon the issues of law.

The *only* findings of fact are those made by the referee, and the rule is that such findings made by a referee, *even on conflicting* testimony have every presumption in their favor.

“Upon the trial of the issues before him the referee had the opportunity of seeing and hearing the witnesses, and he was therefore in a better position to judge of their credibility than are courts, which have before them nothing, but the printed record. The established rule in such cases, from which we see no reason for departing in the present instance, seems to be that the findings of fact, dependent upon con-



flicting testimony, by a judge, master, or a referee, who sees and hears the witnesses testify, have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on his part."

Southern Pine Co. of Georgia et al, v. Savannah Trust Co., 141 Fed. 802, C. C. A. Fifth Circuit.

This being the undoubted rule, then certainly in this case where there was *no conflict* and no evidence introduced by the respondents, the referee's findings of fact most certainly should be conclusive, especially as not a single fact found by the referee is reviewed or even questioned by the District Judge, leaving nothing now for this court to pass upon but apply the law to the findings of fact as they appear in the record. All we ask on this hearing is for the court to apply the law to the facts as found, either in the referee's findings, or if there has been any fact found by the District Judge, then to his finding, but we *do not* ask or seek to have any findings of fact reversed, modified or set aside. The District Judge in passing upon the facts involved in this case decided the matter wholly according to his view of the law, and as the matter is now before this court on the question of whether or not his view of the law was correct or erroneous, it resolves itself simply into a question of law upon the points assigned as error by the appellant and there have been no questions of fact involved and there was nothing for an-

pellants to appeal from under the Bankruptcy Act.

We respectfully submit that the motion to dismiss the appeal should be denied.

*Whitla & Nelson*

Residence and P. O. Address Coeur d'Alene, Idaho; In Proper Person.

*James Lewis & Grimes*

Residence and P. O. Address, Spokane, Wash.;  
Of Counsel.

P

No. 2338

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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PIONEER MINING COMPANY, a Corporation,  
Appellant,

vs.

JOHAN TYBERG, alias EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of the Dis-  
trict Court for the District of Alaska, Second  
Division,  
Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the District of Alaska, Second Division.

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FILED

DEC 4 - 1913



No. 2338

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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PIONEER MINING COMPANY, a Corporation,  
Appellant,  
vs.

JOHAN TYBERG, alias EDWIN JOHANSON,  
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Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the District of Alaska, Second Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Attorneys of Record.**

G. J. LOMEN, Nome, Alaska,

O. D. COCHRAN, Nome, Alaska,

Attorneys for Plaintiff.

O. L. WILLETT, Seattle, Wash.,

GEO. B. GRIGSBY, Nome, Alaska,

B. S. RODEY, Nome, Alaska,

Attorneys for Defendants.

---

*In the District Court for the District of Alaska,  
Second Division.*

No. ———.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Summons.**

The President of the United States of America, to  
Johan Tiberg, *alias* Edwin Johanson and John  
Sundback, as Clerk of said Court, Greeting:

You are hereby summoned and required to appear  
and answer the complaint of the plaintiff on file in  
the office of the Clerk of said Court, at the City of  
Nome, in said District, within thirty days from the  
service of this summons upon you, or judgment for  
want thereof will be taken against you; and you are  
hereby notified that if you fail to answer the said

complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

WITNESS the Honorable CORNELIUS D. MURANE, *Clerk* of the District Court, and the Seal of the said Court hereto affixed this 29th day of October, 1912.

[Court Seal]

J. SUNDBACK,

Clerk of the District Court for the District of Alaska,  
Second Division.

By J. Allison Bruner,  
Deputy Clerk. [1\*]

United States of America,  
District of Alaska,  
Second Division,—ss.

I hereby certify that I received the annexed summons on the 29th day of October, 1912, and thereafter on the same date I served the same at Nome, Alaska, upon Johan Tiberg and John Sundback, as Clerk of the District Court, District of Alaska, Second Division, by delivering to and leaving with each of them a copy thereof, together with a certified copy of the complaint filed therein.

Returned this 31st day of October, 1912.

T. C. POWELL,

United States Marshal.

By H. H. Darrah,  
Deputy.

#### MARSHAL'S COSTS:

2 Services.....\$12.00

[Endorsed]: #2425. No. ——. In the District Court for the District of Alaska, Second Division.

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\*Page-number appearing at foot of page of original certified Record.



Pioneer Mining Company, Plaintiff, vs. Johan Tiberg et al., Defendants. Summons. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Nov. 6, 1912. John Sundback, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff, Nome, Alaska. 3469. [2]

---

*In the District Court for the District of Alaska,  
Second Division.*

No. ———.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Complaint.**

The plaintiff above named complains and alleges:

I.

That the plaintiff is a corporation duly organized, created and existing under the laws of the State of Washington, and doing business in the District of Alaska.

II.

That the defendant John Sundback is the duly appointed and acting Clerk of the District Court for the District of Alaska, Second Division.

III.

That the defendant Johan Tiberg, during the

month of July, 1910, was in the employ of the plaintiff as foreman of the night shift in mining upon the Winter Fraction Placer Mining Claim, in the Cape Nome Recording District, District of Alaska.

#### IV.

That on or about the 22d day of July, 1910, the said plaintiff was the owner of, and in possession of, the premises above mentioned, and was the owner of, and lawfully [3] possessed of, certain sluice-boxes situated upon said mining claim, and of the gold-dust and amalgam therein.

#### V.

That on or about the date last aforesaid the defendant Johan Tiberg wrongfully and unlawfully took and carried away from said sluice-boxes gold-dust, nuggets and amalgam, the said property of plaintiff, of the value of Fifteen Thousand Dollars, and converted the same to his own use.

#### VI.

That thereafter and in the month of September, 1910, the said Tiberg, after having retorted said amalgam, proceeded to the city of Seattle, State of Washington, and there sold to the United States Assay Office in said city the said gold-dust and amalgam so retorted, and received therefor a certificate representing the value of said gold-dust and amalgam amounting to the sum of Fourteen Thousand Three Hundred Forty-five and 02/100 Dollars.

#### VII.

That thereafter the said Johan Tiberg, *alias* Edwin Johanson, cashed said certificate and received therefor the sum of Five Thousand Three Hundred

and Forty-five and 02/100 Dollars in cash and a draft drawn by the Union Savings & Trust Company on the First National Bank of Portland, Oregon, payable to Edwin Johanson or order, in the sum of Nine Thousand Dollars; and thereafter and during the month of September, 1910, the defendant Johan Tiberg was arrested by a deputy United States marshal in the city of Seattle, Washington; and the said moneys and draft were found upon his person and transmitted to the defendant John Sundback, Clerk as aforesaid, as the proceeds of stolen property belonging to plaintiff. [4]

VIII.

That thereafter the said John Sundback caused to be cashed the said draft and received the money therefor in the sum of Nine Thousand Dollars.

IX.

That by reason of the premises, a trust resulted in favor of the said plaintiff and attached to the said proceeds of said gold-dust and amalgam so taken by said Tiberg and exchanged by him as aforesaid, and now in the hands of said defendant clerk as aforesaid, and the *the* defendants have, by implication, agreed with the plaintiff that they would hold said proceeds of said gold-dust and amalgam upon a resulting trust for the plaintiff, and the same is now so held by them.

X.

Plaintiff further alleges that the defendant Johan Tiberg now claims to be the owner of said proceeds of said gold-dust and amalgam, and claims that the said defendant John Sundback, clerk, as aforesaid, holds said proceeds for his use and benefit, and re-

pudiates said trust and denies that the plaintiff has any interest in said property.

### XI.

That the defendant Johan Tiberg is insolvent, and that said proceeds are now in the possession of said John Sundback, clerk as aforesaid, *in custodia legis*, and is not now subject to attachment or garnishment; that plaintiff has no adequate remedy at law.

### XII.

The plaintiff further alleges that unless the defendant Johan Tiberg be enjoined and restrained from claiming, demanding and receiving said proceeds of said gold-dust and amalgam, that said defendant Sundback, [5] clerk, as aforesaid, will deliver up said proceeds to his said codefendant, to plaintiff's irreparable injury and damage.

### XIII.

That said proceeds of said gold-dust and amalgam are of the value of Fourteen Thousand Three Hundred and Forty-five and 02/100 Dollars.

WHEREFORE plaintiff prays judgment that defendants be enjoined from claiming or holding said proceeds and it be decreed that plaintiff is the owner of all of said proceeds of said gold-dust and amalgam now in the hands of said defendants as aforesaid, and that said property and said proceeds be delivered up to the plaintiff, and that plaintiff have judgment for its costs and disbursements herein; and that plaintiff have such other and further relief as to the Court may seem just and equitable.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Plaintiff.



United States of America,  
District of Alaska,—ss.

Jafet Lindeberg, being first duly sworn, deposes and says:

THAT he is the president of the Pioneer Mining Company, the plaintiff above named; that he has read the foregoing complaint, knows the contents thereof and that the same are true as he verily believes.

JAFET LINDEBERG.

Subscribed and sworn to before me this the 28th day of October, 1912.

[Notarial Seal] G. J. LOMEN,  
Notary Public in and for the District of Al. [6]

[Endorsed]: #2425. No. ——. In the District Court for the District of Alaska, Second Division. Pioneer Mining Company, Plaintiff, vs. Johan Tiberg et al., Defendants. Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 29, 1912. John Sundback, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff, Nome, Alaska. [7]



*In the District Court for the District of Alaska,  
Second Division.*

No. ———.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Motion [for Order Requiring Defendants to Show  
Cause, etc.]**

Comes now the plaintiff in the above-entitled action, and moves the Court for an order requiring the defendants above named to show cause before the said Court at the courthouse in the city of Nome, District of Alaska, at a time to be named in said order *o'clock*, why the defendant Johan Tiberg should not be enjoined and restrained from demanding and receiving the proceeds of gold-dust and amalgam mentioned in the complaint, and why the defendant John Sundback, clerk of said Court, should not be enjoined and restrained from delivering up to said Johan Tiberg, or his order, the said proceeds, and that in the meantime, and until the further order of this Court, the said defendant Johan Tiberg be enjoined and restrained from demanding or receiving said proceeds, and that the defendant John Sundback be enjoined and restrained from delivering up said proceeds to said Johan Tiberg or his order.

This motion is based upon the affidavit of Jafet Lindeberg hereto attached, and the complaint in said action filed herein.

O. D. COCHRAN,  
G. J. LOMEN,  
Attorneys for Plaintiff. [8]

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*In the District Court for the District of Alaska,  
Second Division.*

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Affidavit [of Jafet Lindeberg].**

District of Alaska,  
Cape Nome Precinct,—ss.

Jafet Lindeberg, being first duly sworn, deposes  
and says:

THAT he has read the complaint of the plaintiff,  
in the above-entitled action and that the facts therein  
stated are true as he verily believes.

JAFET LINDEBERG.

Subscribed and sworn to before me this the 28th  
day of October, 1912.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

[Endorsed]: No. 2425. In the District Court for  
the District of Alaska, Second Division. Pioneer

Mining Company, Plaintiff, vs. Johan Tiberg et al., Defendants. Motion and Affidavit. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 29, 1912. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff, Nome, Alaska. [9]

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*In the District Court for the District of Alaska,  
Second Division.*

No. ———.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON and  
JOHN SUNDBACK, as Clerk of Said Court,  
Defendants.

**Order [Requiring Defendants to Show Cause, and  
Enjoining and Restraining Defendant Johan  
Tiberg, etc.]**

Upon reading and filing the complaint in the above-entitled action, and the affidavit of Jafet Lindeberg herein, upon motion of O. D. Cochran and G. J. Lomen, attorneys for plaintiff, it is

ORDERED that the defendants above-named shall show cause, if any they have, why they should not be enjoined and restrained, the said Johan Tiberg, from demanding and receiving the proceeds from the gold-dust and amalgam mentioned in the Complaint, and why the said defendant John Sundback, clerk

as aforesaid, should not be enjoined and restrained from delivering up to said Johan Tiberg, or his order, the said proceeds; said cause if any, to be shown to the Court at the courthouse in the city of Nome, District of Alaska, on the 29th day of Oct., 1912, at the hour of 1 o'clock.

It is further ordered that until said hearing, and until further order of the Court, the said defendant be enjoined and restrained, the said Johan Tiberg, his agents and attorneys, from demanding or receiving the proceeds of said gold-dust and amalgam mentioned in the complaint, and the said defendant John Sundback, clerk as aforesaid, from [10] delivering up to said Johan Tiberg, or his order, the said proceeds or any part thereof.

CORNELIUS D. MURANE,

District Judge.

United States of America,  
District of Alaska,  
Second Division,—ss.

I hereby certify that I received the annexed Order on the 29th day of October, 1912, and thereafter on the same date I served the same at Nome, Alaska, upon Johan Tiberg and John Sundback, as clerk of the District Court, District of Alaska, Second Division, by delivering to and leaving with each of them a copy thereof, certified to be such by the Clerk of the District Court, District of Alaska, Second Division.

Returned this 29th day of October, 1912.

T. C. POWELL,  
United States Marshal.  
By H. H. Darrah,  
Deputy.

**MARSHAL'S COSTS:**

2 Services.....\$12.00

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Company, Plaintiff, vs. Johan Tiberg et al., Defendants. Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 29, 1912. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff, Nome, Alaska. 3469. Vol. 10, Orders and Judgments, p. 15. C. [11]

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*In the District Court, District of Alaska, Second Division.*

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON and  
JOHN SUNDBACK, as Clerk of Said Court,  
Defendants.

**Demurrer [to Complaint].**

Comes now the defendant, Johan Tiberg, and demurs to the complaint of the plaintiff on file herein for the following grounds:



1.

That said complaint does not state facts sufficient to constitute a cause of action.

Dated at Nome, Alaska, February —, 1913.

O. L. WILLETT,

GEO. B. GRIGSBY,

Attorneys for Deft. Johan Tiberg.

Service of above demurrer admitted Feb. 8th, 1913.

O. D. COCHRAN,

Of Attys. for Plf.

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Co., Plaintiff, vs. Johan Tiberg, etc., et al., Defendants. Demurrer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Feb. 8, 1913. John Sundback, Clerk. By ———, Deputy. Geo. B. Grigsby, Atty. for Deft. Tiberg. [12]

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**[Order Sustaining Demurrer to Complaint, etc.]**

*In the District Court for the District of Alaska,  
Second Division.*

TERM MINUTES, General 1913 Term, Beginning  
January 6, 1913.

Saturday, June 28, 1913, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge,  
presiding.

Upon the convening of Court the following proceedings were had:

2425.

PIONEER MINING CO.

vs.

TIBERG et al.

The Court having under consideration the defendant's demurrer to plaintiff's complaint, announced that said demurrer was sustained; memo-opinion filed. Mr. Geo. B. Grigsby moved the Court for an order directing the clerk of the court to turn over the money belonging to the defendant now in the hands of the clerk; motion continued until Wednesday next. Mr. G. J. Lomen, on behalf of the plaintiff, moved the Court to fix the amount of bond on appeal, which motion was continued until Wednesday, next. [13]

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*In the District Court for the District of Alaska,  
Second Division.*

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON and  
JOHN SUNDBACK, as Clerk of Said Court,  
Defendants.

**Opinion.**

COCHRAN & LOMEN, for the Plaintiff.

GRIGSBY and WILLETT, for the Defendant.

Before MURANE, District Judge.

Plaintiff brings this suit in equity for the pur-

pose of impressing a trust upon certain funds now in the hands of John Sundback as duly appointed Clerk of the Court of the District of Alaska, Second Division, and alleges in its bill that the defendant, Johan Tiberg, during the month of July, 1910, was in the employ of plaintiff as foreman of the night shift in mining upon a certain placer claim in this division. That during said month of July the plaintiff was the owner of and in possession of said claim and of certain sluice-boxes situated thereon, and of the gold-dust and the amalgam therein. That the defendant, Johan Tiberg, about the 22d day of July, 1910, wrongfully and unlawfully took and carried away from said sluice-boxes gold-dust, nuggets and amalgam, the said property of plaintiff, of the value of fifteen thousand dollars (\$15,000), and converted the same to his own use.

That thereafter and in the month of September, 1910, the said Tiberg, after having retorted said amalgam, proceeded to the [14] city of Seattle, State of Washington, and there sold to the United States Assay office in said city, the said gold-dust and amalgam so retorted, and received therefor a certificate representing the value of said gold-dust and amalgam, amounting to the sum of fourteen thousand, three hundred forty-five and two-hundredths dollars (\$14,345.02).

That thereafter the said Johan Tiberg, *alias* Edwin Johanson cashed said certificate and received therefor the sum of five thousand three hundred and forty-five and two hundredths dollars (\$5,345.02) in cash and a draft drawn by the Union Savings &

Trust Company on the First National Bank of Portland, Oregon, payable to Edwin Johanson or order, in the sum of nine thousand dollars; and thereafter and during the month of September, 1910, the defendant Johan Tiberg was arrested by a United States deputy marshal, in the city of Seattle, Washington, and the said moneys and draft were found upon his person and transmitted to the defendant, John Sundback, clerk as aforesaid, as the proceeds of stolen property belonging to plaintiff.

That thereafter the said John Sundback caused to be cashed the said draft and received the money therefor in the sum of nine thousand dollars (\$9,000).

That by reason of the premises a trust resulted in favor of the said plaintiff and attached to the said proceeds of said gold-dust and amalgam so taken by said Tiberg and exchanged by him as aforesaid, and now in the hands of said defendant clerk, as aforesaid, and the defendants have, by implication, agreed with the plaintiff that they would hold said proceeds of said gold-dust and amalgam upon a resulting trust for the plaintiff, and the same is now so held by them.

Plaintiff further alleges that the defendant Johan Tiberg now claims to be the owner of said proceeds of said gold-dust and amalgam, and claims that the said defendant, John Sundback, clerk as aforesaid, holds said proceeds for his use and benefit, and repudiates said trust, and denies that the plaintiff has any interest in said property.

That the defendant Johan Tiberg is insolvent, and that said proceeds are now in the possession of said



John Sundback, clerk as [15] aforesaid, *in custodia legis*, and is not now subject to attachment or garnishment; that plaintiff has no adequate remedy at law.

The plaintiff further alleges that unless the defendant Johan Tiberg be enjoined and restrained from claiming, demanding and receiving said proceeds of said gold-dust and amalgam, that said defendant Sundback, clerk as aforesaid, will deliver up said proceeds to his said codefendant, to plaintiff's irreparable injury and damage.

That said proceeds of said gold-dust and amalgam are of the value of fourteen thousand three hundred and forty-five and two-hundredths dollars (\$14,345.02).

Wherefore plaintiff prays judgment that defendants be enjoined from claiming or holding said proceeds and it be decreed that plaintiff is the owner of all of said proceeds of said gold-dust and amalgam now in the hands of said defendants as aforesaid, and that said property and said proceeds be delivered up to the plaintiff, and that plaintiff have judgment for its costs and disbursements herein; and that plaintiff have such other and further relief as to the Court may seem just and equitable.

To this complaint the defendant Tiberg interposed a general demurrer, alleging that the complaint does not state facts sufficient to constitute a cause of action.

After oral arguments, the attorneys for the respective parties submitted written briefs. The defendant contends that the bill does not state a cause



of action either at law or in equity, first, because it appears upon the face of the bill that the money, or property, was taken from the person of the defendant Tiberg by an officer of the law, after having placed Tiberg under arrest, and is now *in custodia legis*; and second, because the property in question is not a trust fund nor the proceeds of a trust fund, and that no fiduciary or trust relation at any time existed between the defendant Tiberg and the plaintiff company with relation to the amalgam or its proceeds, and that consequently equity has no jurisdiction and cannot impress a trust under such circumstances.

Plaintiff contends, through its attorneys, that when property [16] has been stolen, equity recognizes that the property always belongs to the true owner, and therefore the proceeds must also belong to him and may be reclaimed in a suit in equity against anyone holding in bad faith, and insists that neither a fiduciary relation nor a trust estate is necessary to give a court of equity jurisdiction, and further that no right of the defendant under the Fourth Amendment of the Constitution of the United States would be violated by holding the monies taken from the person of the defendant by a United States deputy marshal after the arrest of the defendant upon criminal process. This briefly states the facts as they appear from the pleadings and the contentions of the respective parties.

We will first consider the question of the jurisdiction of a court of equity to impress a trust upon property or the proceeds of property, where the

original property was not a trust estate and no fiduciary relation existed between the owner and the person converting or appropriating the same. In this case, the complaint does not show the defendant to have been in a position of trust or confidence; in other words, he was not the custodian, trustee, nor bailee of the amalgam, gold-dust and nuggets contained in the sluice-boxes of plaintiff.

The great weight of authority seems to be that unless some such relation exists, no trust arises by implication of the law, either *ex maleficio* or *in invitum*. The following are a few of the many definitions of a trust given by the Courts:

“A trust in common parlance may be said to be a confidence reposed by someone in someone for some public or private purpose.”

Ex parte Faulkner, 1 W. Va. 269, 298.

“A trust signifies a holding of property subject to a duty of employing it or applying its proceeds according to the directions given by the person from whom it was derived.”

Monroe vs. Crouse, 12 N. Y. Supp. 815.

“A trust in its simplest elements is a confidence reposed in one person who is termed ‘trustee’ for the benefit of another who is called the ‘cestui que trust,’ and it is a confidence respecting property which is thus held by the former for the benefit of the latter.”

Carter vs. Gibson, 45 N. W. 634.

“A trust is an equitable obligation either expressed or implied, resting upon a person by reason of a confidence reposed in him to apply or deal

with the property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence.”

McCreary vs. Gewinner, 29 S. E. 960. [17]

A trustee, in the widest meaning of the term, is defined to be a person in whom some estate, interest, or power in or affecting property of any description, is vested for the benefit of another.

Taylor vs. Davis, 110 U. S. 330.

Truedale vs. Philadelphia Trust Safe Deposit & Ins. Co., 65 N. W. 133.

Robertson vs. Bullions, 9 Barb. 64, 101.

In Henninger vs. Heald, 30 Atl. 809, the Court says, “The wrongdoer who becomes possessed of property under such circumstances as amount to a tort has been styled ‘a trustee,’ but this is for want of a better term and because he has no title to the property and really holds it for the true owner. It might as well be said that where two persons conspire to possess themselves of the personal property of another when he brings trover for its recovery, they should be styled ‘trustees’ instead of ‘tort-feasors’ and should be permitted to claim the benefit of a lien for care or for pro-vender.”

All instances of constructive trusts may be referred to what equity denominates fraud, either actual or constructive in violation of fiduciary obligation. Perry, in his work on Trusts, defines constructive trusts as “those which arise when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself.”

Again, in section 128, "if one who stands in no fiduciary relation appropriates another's money and invests it in property, no trust results to the owner of the money."

The complaint does not show that the defendant appropriated a trust fund. He was employed as night foreman in mining, but his relation to the amalgam appears no different from that of any other laborer. Under such a state of facts and the foregoing authorities, it appears clear that equity would have no jurisdiction to impress a trust upon the fund in question.

Upon the other question, it appears from the complaint that the fund in question was taken from the person of the defendant Tiberg after his arrest on a criminal charge. Art. IV, Amendments to the Constitution, protects a person, his house, papers, and effects, against unreasonable search and seizure. A person arrested on a criminal warrant may be searched, and anything which is evidence of the commission of the crime with which he is charged, or with which he may do personal violence to himself or others, or by means of which he may effect an escape, may be taken from his person and held by the officer having the prisoner in charge. This is permitted on the grounds of public policy, but no individual citizen should [18] be permitted to take advantage of this necessary violation of the person of the prisoner. The case of *Dahms vs. Sears*, reported in the 11th Pacific Reporter, pgs. 895-896, very clearly states what appears to be the true rule.

"I am of the opinion that property taken from



a prisoner under such circumstances is not the subject of attachment or levy by virtue of an execution. The security of the public may justify the searching of a prisoner confined in prison upon criminal or even civil process, and the taking from him of any property in his possession that would aid him to make an escape. It would probably be regarded, under such circumstances, as a reasonable search and seizure; but to allow private parties to take advantage of the circumstances in order that they may secure a personal benefit would be a violation of that faith which the commonwealth owes to persons held in custody under its authority and laws. It would lead to oppression and abuse. The object and purpose of an arrest under civil and criminal process would be perverted, and schemes and devices be resorted to by importunate creditors to enforce a payment of their demands that would outrage justice and the right to personal security. The case under consideration is not free from suspicion that unscrupulous measures were employed for the purpose indicated. The attachment of the money taken from the person of Keltener followed in very quick succession its seizure, and gives rise to the inference that collusion existed between the officers of the prison and the representatives of the creditors. One of the attachments was levied upon the money the same day it was taken from Keltener."

See, also, Cooley's Constitutional Limitations, 5th ed., pp. 365-373 and notes.

The case of the State of Iowa vs. Williams, 16 N.



W. 586, is one very similar to the one at bar, and holds that before any third party can proceed against property taken from a prisoner, the *statu quo* must be restored, especially so after a trial and an acquittal. It may be suggested that the complaint does not show a trial and an acquittal in the case in which Tiberg was arrested and the fund in question taken from his person. Neither does the complaint show a conviction in that case, and under our law the presumption of innocence must be indulged until a conviction is shown. What plaintiff's remedy is under our statute is not necessary for the consideration of the Court at this time.

The principal case relied upon by plaintiff is Aetna Indemnity Co. of Hartford, Conn., vs. Malone et al., 131 N. W. 200. It will be observed in that case that the defendants had been convicted and the controversy was between other parties and no question of constitutional right seems to have been raised or involved, and the only [19] authority cited in the opinion is Newton vs. Porter, 5th Lans. (N. Y.) 416.

Had the defendant Tiberg been convicted in the criminal case, the plaintiff would undoubtedly have received the fund in controversy, under Sec. 266, Ch. 30 of the Code of Alaska, but the defendant not having been convicted, it would seem, as said in the Iowa case, he was entitled to go out of court and be placed in the same situation in which he was before the money was taken. This rule will undoubtedly do injustice in some instances, but it is better that injustice be done sometimes to an individual than that the personal liberties, private documents and per-

sonal effects of the masses be placed at the mercy of unscrupulous litigants.

Par. X of the complaint shows that the defendant Tiberg claims to be the owner of the fund in controversy, and denies that plaintiff has any interest in the fund. Therefore, the main question to be passed upon is the question of title to the personal property held by the clerk of the court, and if it is not a trust fund, parties have a constitutional right to have the question of title passed upon by a jury.

The bill does not state a cause of suit in equity, and plaintiff's attorneys admit that it does not state a cause of action at law; therefore the demurrer should be sustained and it is so ordered.

Dated this 28th day of June, 1913, Nome, Alaska.

[Endorsed]: #2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Co. v. Johan Tiberg and John Sundback. Opinion. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 28, 1913. John Sundback, Clerk. By \_\_\_\_\_, Deputy. [20]

*In the District Court for the District of Alaska, Second Division.*

No. ———.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Amended Complaint.**

The plaintiff above named, for its amended complaint herein, complains and alleges:

I.

That the plaintiff is a corporation duly organized, created and existing under the laws of the State of Washington, and doing business in the District of Alaska; and during the times hereinafter mentioned was such corporation.

II.

That the defendant John Sundback is the duly appointed and acting clerk of the District Court for the District of Alaska, Second Division.

III.

That the defendant Johan Tiberg, during the month of July, 1910, was in the employ of the plaintiff as foreman of the night-shift in mining upon the Winter Fraction Placer Mining Claim in the Cape Nome Recording District, District of Alaska, the property of said plaintiff.

## IV.

That on or about the 22d day of July, 1910, the said plaintiff, then and there the owner of said mining claim [21] and in the possession thereof, was also the owner of, and in the possession of, certain sluice-boxes situated upon said mining claim, and of the gold-dust, nuggets and amalgam therein.

## V.

That as foreman and employee of the plaintiff as aforesaid, the defendant Johan Tiberg had the care and custody of said sluice-boxes, gold-dust, nuggets and amalgam therein, and it was then and there his duty to protect and safeguard the same and not to remove from said sluice-boxes, or permit to be removed therefrom, said gold-dust, nuggets and amalgam; that notwithstanding his said employment and duties, and on or about the date last aforesaid, the said defendant Johan Tiberg wrongfully and unlawfully, and without the leave or consent of the plaintiff, took and carried away from said sluice-boxes, the said gold-dust, nuggets and amalgam, the said property of the plaintiff, and of the value of Fifteen Thousand Dollars (\$15,000.00), and upwards, concealed the same from plaintiff, and converted the same to his own use, and has, ever since, failed and neglected to account to the plaintiff therefor.

## IV.

That thereafter, and in the month of September, 1910, the said Tiberg, after having retorted said amalgam, proceeded to the city of Seattle, State of Washington, and there sold to the United States Assay Officer in said city the said gold-dust, nuggets



and amalgam so retorted, and received therefor a certificate representing the value of said gold-dust, nuggets and amalgam amounting to the sum of fourteen thousand three hundred forty-five and two-hundredths dollars (\$14,345.02).

#### VII.

That thereafter, and during said month of September, the said Johan Tiberg, *alias* Edwin Johanson, presented [22] said certificate to the Union Savings and Trust Company for payment, and received in payment of said certificate the sum of five thousand three hundred forty-five and two-hundredths dollars (\$5,345.02) in cash, and a draft drawn by said Union Savings and Trust Company on the First National Bank of Portland, Oregon, payable to said Edwin Johanson, or order, in the sum of nine thousand dollars (\$9,000.00).

#### VIII.

That thereafter and also during the month of September, 1910, the said defendant Johan Tiberg, was arrested by a deputy United States marshal in the city of Seattle, State of Washington, charged with the crime of larceny of said gold-dust, nuggets and amalgam, and said moneys and draft, the proceeds of said gold-dust nuggets and amalgam, were found by said deputy marshal in the possession of said defendant Johan Tiberg, and were, by said deputy marshal, seized as the proceeds of said stolen property, and as such proceeds were transmitted and delivered to the defendant John Sundback as Clerk of said Court.

#### IX.

That thereafter the said John Sundback caused the



said draft so received by him to be cashed, and received in payment thereof the sum of nine thousand dollars, face value of said draft, and now has in his possession the said proceeds of said gold-dust, nuggets and amalgam so converted by the defendant Tiberg, as aforesaid, and so converted into cash, to wit the sum of fourteen thousand three hundred forty-five and two-hundredths dollars (\$14,345.02); that said John Sundback received said moneys as Clerk of said Court, and has held the same for and on account of the case of the United States against said Johan Tiberg now adjudicated in said Court, and should now hold the same on account of this action. [23]

### X.

That said defendant Tiberg is insolvent, and is not now, as plaintiff is informed and believes, an inhabitant of the District of Alaska; that said defendant John Sundback, as plaintiff is informed and believes, neither has or claims any interest in said proceeds, except as a mere depository thereof, for the use and benefit of the true owner thereof, and holds the same subject to the orders and directions of the said Court and not otherwise.

### XI.

That the defendant Tiberg has demanded, by oral motion addressed to said Court, the return to him of said deposit in the hands of his said codefendant, and threatens to demand and claim the same, and unless restrained from so doing he will demand and claim said deposit and the said proceeds of said gold-dust, nuggets and amalgam from his said codefendant

Sundback, and of this Court.

## XII.

That by reason of the premises, the defendant Tiberg is liable to an accounting to plaintiff, and there is now due and owing plaintiff from the said defendant Tiberg, *and* said sum of fourteen thousand three hundred forty-five and two-hundredths dollars (\$14,345.02), and a constructive trust in favor of said plaintiff has attached to the said proceeds of said gold-dust, nuggets and amalgam, and a lien on said proceeds to the extent of said fourteen thousand three hundred forty-five and two-hundredths dollars should and ought to be declared in favor of plaintiff and in equity belongs to plaintiff.

That the said acts and threatened acts of the said defendant Tiberg were and are in violation of plaintiff's rights in and to said property and proceeds, and if said moneys shall be paid to said defendant Tiberg, the plaintiff [24] will suffer irreparable injury, loss and damage, and such payment would and said threats tend to render any judgment herein in favor of the plaintiff ineffectual.

WHEREFORE plaintiff demands judgment against the defendant Tiberg for the sum of fourteen thousand three hundred forty-five and two-hundredths dollars (\$14,345.02); that plaintiff be adjudged to have a specific lien on said proceeds now in the hands of said defendant Sundback, clerk as aforesaid, to the extent of said sum of fourteen thousand three hundred forty-five and two-hundredths dollars, less the fees and charges of said clerk, if any; that said proceeds be declared to be a trust fund to

which plaintiff is equitably entitled; that pending the determination of this action said trust fund and proceeds be placed in the registry of the Court in this action, to abide the determination thereof; and that in the meantime, and forever, the defendant, his attorneys, agents and representatives, be restrained and enjoined from demanding or receiving the same—that plaintiff have judgment for its costs and disbursements herein, and for such other and further relief as to the Court shall seem just and proper.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Plaintiff. [25]

United States of America,

District of Alaska,—ss.

L. Stevenson, being first duly sworn, according to law, deposes and says:

That he is the manager of the Pioneer Mining Company, the plaintiff above named, that he has read the foregoing amended complaint, knows the contents thereof, and that the same is true as he verily believes.

L. STEVENSON.

Subscribed and sworn to before me this the 21st day of July, 1913.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

My Comm. expires June 28, 1917.

Service of the foregoing amended complaint is

hereby admitted at Nome, Alaska, this 21st day of June, 1913.

G. B. GRIGSBY,  
Atty. for Defendant Tiberg.  
J. SUNDBACK,  
One of Defendants.

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Company, Plaintiff, vs. Johan Tiberg, *alias* Edwin Johanson, and John Sundback as Clerk of said Court, Defendants. Amended Complaint. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 21, 1913. John Sundback, Clerk. By —————, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff. [26]

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*In the United States District Court for the District of Alaska, Second Division.*

No. 2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON  
and JOHN SUNDBACK as Clerk of said  
Court,

Defendants.

**Demurrer [to Amended Complaint].**

Comes now the defendant, Johan Tiberg, and demurs to the amended complaint filed herein on the



following ground: That said complaint does not state facts sufficient to constitute a cause of action.

GEORGE B. GRIGSBY,

Attorney for Defendant Tiberg.

Service of a copy of the foregoing Demurrer this 28th day of July, 1913, at 3:30 P. M. admitted.

G. J. LOMEN,

Of Attorneys for Plaintiff.

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Co., a Cor., Plaintiff, vs. Johan Tiberg, *alias* Edwin Johanson and John Sundback, as Clerk of said Court, Defendants. Demurrer. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 29, 1913. John Sundback, Clerk. By ————, Deputy. Geo. B. Grigsby, Attorney for Tiberg. [27]

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**[Order Sustaining Demurrer to Amended Complaint,  
etc.]**

*In the District Court for the District of Alaska, Second Division.*

TERM MINUTES, General 1913 Term, beginning January 6, 1913. Saturday, August 9, 1913, at 11 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of court the following proceedings were had:



2425.

PIONEER MINING CO.

vs.

TIBERG et al.

Defendants' demurrer to plaintiff's amended complaint was argued and submitted to the Court, whereupon the Court made an order sustaining said demurrer. Upon motion of Mr. G. J. Lomen plaintiff was allowed an exception to said order. [28]

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*In the United States District Court for the District  
of Alaska, Second Division.*

No. ———.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK as Clerk of Said  
Court,

Defendants.

### **Judgment.**

The above-entitled action coming on to be heard upon the application of the defendant, Johan Tiberg, that judgment be entered herein, and it appearing to the Court that the demurrer of the defendant, Johan Tiberg, to plaintiff's complaint heretofore filed herein was, on the 28th day of June, 1913, sustained by the Court, and the plaintiff having thereafter filed an amended complaint herein, and

it further appearing that the demurrer of the defendant, Johan Tiberg, to plaintiff's amended complaint herein was, on the 9th day of August, 1913, sustained by the Court, and the plaintiff having failed and refused to further amend its said complaint, it is by the Court

ORDERED, ADJUDGED and DECREED that this action be, and the same is hereby dismissed.

IT IS FURTHER ORDERED that the defendant, Johan Tiberg, have and recover from the plaintiff his costs and disbursements of suit taxed at —— Dollars (\$ ——).

Done in open court at Nome, Alaska, this 18th day of August, 1913.

CORNELIUS D. MURANE,

U. S. District Judge. [29]

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Co., a Cor., Plaintiff, vs. Johan Tiberg et al, Defendants. Judgment. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 18, 1913. John Sundback, Clerk. By J.A.B., Deputy. Geo. B. Grigsby, Attorney for Defendant Tiberg. Vol. 10, Orders and Judgments, p. 268. C. [30]

[Order Directing Publication of Deposition of Johan Tiberg, Denying Injunction, Dissolving Restraining Order, etc.]

*In the District Court for the District of Alaska,  
Second Division.*

TERM MINUTES, General 1913 Term, beginning  
January 6, 1913. Monday, August 18, 1913, at  
10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge.  
presiding.

Upon the convening of court the following proceedings were had:

. . . . .

2425.

PIONEER MINING CO.

vs.

TIBERG et al.

The hearing upon the order to show cause why an injunction *pendente lite* should not issue came on regularly for hearing. Mr. G. J. Lomen, on behalf of plaintiff, filed the affidavit of Louis Stevenson.

Upon motion of Mr. Lomen, the deposition of defendant Johan Tiberg was ordered published.

The order to show cause was thereupon submitted without argument, whereupon the Court made an order denying an injunction *pendente lite* and ordered that the preliminary restraining order heretofore issued herein be dissolved.

Upon motion of Mr. G. J. Lomen, it was ordered that the property in controversy in this action remain *in statu quo*, to wit, in the hands of the Clerk of the Court, for the present and until the further order of the Court. [31]

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*In the District Court, District of Alaska, Second Division.*

#2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

### **Bill of Exceptions.**

This was an action in equity seeking against the defendants to impress upon \$14,345.02, the proceeds of alleged stolen property in the hands of said clerk, a constructive trust, *ex maleficio*, and to restrain the defendant Tiberg from demanding or receiving said proceeds and for general relief. By way of provisional remedy, plaintiff sought an injunction, *pendente lite*. In the latter proceedings an order to show cause why the injunction should not be granted was made and served returnable at a time and place designated, and defendant Tiberg was, by said order in the meantime and until the further order of the Court, restrained from demanding or receiving said proceeds.

Complaint was filed herein on the 29th day of October, 1912, and personal service of the summons and complaint was had on the defendants. The defendant Tiberg demurred to the complaint; which demurrer coming on to be heard June 28th, 1913, was sustained and the plaintiff duly excepted, which exception was allowed. The plaintiff thereupon served and filed an amended complaint, to which the defendant Tiberg again demurred. This demurrer coming on [32] regularly to be heard, August 9th, 1913, was also sustained. The plaintiff duly excepted, and the exception was allowed. Judgment of dismissal of the action, and for costs in favor of defendant Tiberg, was thereupon, plaintiff electing to stand on its complaint, on the 18th day of August, 1913, entered; to which the plaintiff excepted and the exception was allowed. In the injunction proceedings above mentioned the demurrers to the original and amended complaints having been sustained, and the plaintiff electing not to plead over, the plaintiff's motion for injunction *pendente lite* was, on the 18th day of August, denied, and the restraining order, theretofore issued, dismissed; to all of which the plaintiff duly excepted, and exceptions were allowed.

On motion of plaintiff and notice of appeal being given, the Court thereupon fixed the amount of the supersedeas bond at \$3,000.00, and ordered the proceeds aforesaid to be held in *statu quo*, subject to the further order of the Court.

And now in furtherance of justice, and that right may be done, the plaintiff presents the foregoing bill of exceptions in this cause and prays that the same



may be settled, allowed, signed and certified by the Judge of this Court as provided by law.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Plaintiff.

Due service of the foregoing proposed bill of exceptions is hereby admitted at Nome, Alaska, this 16th day of Sept. 1913.

GEORGE B. GRIGSBY,

Atty. for Deft. Johan Tiberg.

B. S. RODEY,

Atty. for Deft. Sundback. [33]

**Order Allowing Bill of Exceptions.**

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

CORNELIUS D. MURANE,

District Judge.

Done in open court this 4 day of October, 1913.

[Endorsed]: #2425. In the United States District Court, District of Alaska, Second Division. Pioneer Mining Co., a Corporation, Plaintiff, vs. Johan Tiberg, *alias* Edwin Johanson and John Sundback, as Clerk of Said Court, Defendants. No. 2425. Bill of Exceptions. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 17, 1913. John Sundback, Clerk. By ———, Deputy. L. O. D. Cochran and G. J. Lomen, Attys. for Plff., Nome, Alaska. [34]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Assignment of Errors.**

Comes now the plaintiff, Pioneer Mining Company, and assigns the following errors upon which it will rely in prosecuting its appeals from the final judgment in the above-entitled action, dated August 18th, 1913, and from the order denying its application for an injunction *pendente lite* against the defendants and from the order discharging the restraining order granted on the motion for an injunction *pendente lite*:

1. The Court erred in sustaining the demurrer of the defendant, Johan Tiberg, to the original complaint in said action.
2. The Court erred in sustaining the demurrer to the amended complaint in said action.
3. The Court erred in granting defendant's motion dismissing plaintiff's complaint.
4. The Court erred in entering judgment dismissing plaintiff's complaint.
5. The Court erred in denying plaintiff's motion

for an injunction *pendente lite*.

6. The Court erred in discharging the order to show cause why an injunction *pendente lite* should not be made.

7. The Court erred in discharging the restraining order granted in said order to show cause why an injunction should not [35] be granted.

Dated at Nome, Alaska, this 9th day of October, 1913.

G. J. LOMEN,  
O. D. COCHRAN,  
Attorneys for Plaintiff.

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tyberg et al., Defendants. Assignment of Errors. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By J. A. B., Deputy. ———, Attys. for Plaintiff. [36]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Petition for Allowance of Appeal.**

Comes now the plaintiff above named, and feeling itself aggrieved by the final judgment made and entered in the above-entitled cause, on the 18th day of August, 1913, dismissing said action wherein it prayed for the enforcement of a constructive trust, injunction and general relief, and, feeling itself aggrieved by the proceedings had in said cause, in denying plaintiff's application for an injunction *pendente lite* against the defendants, and in dismissing and discharging the order to show cause why an injunction *pendente lite* should not be granted, and in discharging the restraining order made as a part of said order to show cause, does hereby appeal from said final judgment and from the whole and every part thereof, and from the said order refusing and denying to plaintiff the said injunction *pendente lite*, and from the said order discharging said order to show cause, and from the said order discharging the said restraining order, to the United States Circuit Court of Appeals for the Ninth Circuit, and petitions the Court for an order allowing the said appeals.

And said plaintiff further prays that the order heretofore made by said Court, dated the 18th day of August, 1913, [37] wherein and whereby said Court, for cause shown, ordered and directed that the alleged trust fund remain in the custody of the Clerk of said Court until the further order of the Court, be continued, pending said appeals herein and until the further order of the Court, upon the filing of a good and sufficient bond, to be approved by said



Court, in the penal sum of Three Thousand (3,000) Dollars, and a cost bond in the sum of Two Hundred and Fifty (250) Dollars, or, one bond in the sum of Three Thousand Two Hundred and Fifty (3,250) Dollars, conditioned that the plaintiff shall prosecute said appeals to effect and answer for all costs and damages if he fail to make good his appeal, and shall pay, or cause to be paid, to the said defendants, their heirs, executors, administrators or assigns all damages which they shall suffer by reason of said appeals, if the same should be wrongful or without sufficient cause, and all damages which they, or either of them, shall suffer by reason of said order directing said trust fund involved in said action to be held *in statu quo* in the hands of the clerk of said Court.

And plaintiff further prays that a transcript of the proceedings upon which the said judgment and orders appealed from were made and entered, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Circuit.

Dated at Nome, Alaska, this 9th day of October, 1913.

G. J. LOMEN,

O. D. COCHRAN,

Attorneys for Plaintiff. [38]

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tyberg et al., Defendants. Petition for Allowance of Appeal. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9,



1913. John Sundback, Clerk. By J. A. B., Deputy.  
———, Attys. for Plaintiff. [39]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Order Allowing Appeal and Fixing Amount of Bond.**

Upon the motion of G. J. Lomen and O. D. Cochran, attorneys for plaintiff above named.

IT IS ORDERED that the appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment and decree heretofore made and entered herein on the 18th day of August, 1913, and from the whole thereof; and from the order denying plaintiff's motion for the injunction *pendente lite* herein; and from the order discharging the order to show cause why an injunction *pendente lite* should not be granted; and from the order discharging the restraining order issued upon the granting of said order to show cause, be, and the same are, each and all, hereby allowed, as prayed for by the plaintiff.

IT IS FURTHER ORDERED that an undertaking on appeal and to secure the defendants against

damage by reason of the order heretofore made ~~and received~~, and hereby continued, be given by the plaintiff to the defendants, in the sum of Three Thousand Two Hundred and Fifty (3250) Dollars, conditioned that the plaintiff shall prosecute said appeals to effect and [40] answer for all costs and damages if it fail to make good its appeal if the same be wrongful or without sufficient cause, and all damages which they, or either of them, shall suffer by reason of the order heretofore made and entered on the 18th day of August, 1913, directing said trust fund involved in said action to be held *in statu quo* in the hands of the Clerk of said Court; and,

IT IS FURTHER ORDERED that upon the filing of said bond, the order heretofore made directing the trust fund involved in said action to remain *in statu quo* in the hands of the Clerk of said Court, be, and the same is hereby continued, pending said appeal and until the further order of said Court.

Done in open court this 9 day of October, 1913.

CORNELIUS D. MURANE,

District Judge.

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tiberg et al., Defendants. Order Allowing Appeal and Fixing Amount of Bond. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By J. A. B., Deputy. ———, Attys. for Plaintiff.  
[41]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Undertaking.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, the PIONEER MINING COMPANY, a  
corporation, as principal, and L. Stevenson and G. P.  
Goggin, as sureties, are held and firmly bound unto  
the defendants above-named, in the sum of Three  
Thousand Two Hundred and Fifty (3250) Dollars,  
to be paid to the said defendants, their heirs, exec-  
utors, administrators or assigns, the payment of  
which well and truly to be made, we bind ourselves  
and each of us, jointly and severally, and our and  
each of our heirs, executors, administrators and as-  
signs firmly by these presents.

Sealed with our seals and dated this 9th day of  
October, 1913.

The condition of the above undertaking and obliga-  
tion is, that whereas, the above-named plaintiff, the  
Pioneer Mining Company, has filed its petition for  
an appeal to the United States Circuit Court of Ap-  
peals for the Ninth Circuit, to reverse the judgment

of dismissal in the above-entitled action, dated August 18th, 1913; and for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of said District Court denying plaintiff's [42] motion for an injunction *pendente lite* in said action; and from an order of said District Court discharging the order to show cause why an injunction *pendente lite* should not be granted; and from the order of said District Court discharging the restraining order granted with said order to show cause;

And, whereas, the said District Court for the District of Alaska, Second Division, upon the 18th day of August, 1913, made its order directing that the trust fund involved in said action remain *in statu quo* in the hands of the Clerk of said District Court until the further order of the Court;

And, whereas, the said District Court in and by its order granting said appeals herein, continued its said order directing said trust fund to remain *in statu quo* in the hands of said Clerk pending said appeal and until the further order of said Court.

Now, therefore, if the above-named plaintiff Pioneer Mining Company shall prosecute the said appeals to effect and answer all costs and damages if it fail to make good its said appeals, and shall pay, or cause to be paid, to the said defendants, their heirs, executors, administrators and assigns all damages which they shall suffer by reason of said appeals, or any or either of them, if the same should be wrongful or without sufficient cause, and shall pay, or cause to be paid, to the said defendants, their heirs, executors,



administrators and assigns all damages which they, or either of them, shall suffer by reason of the said order of said Court directing the trust fund involved in said action to remain *in statu quo* in the hands of the Clerk of said District Court, then this obligation to be void, otherwise to remain in full force and [43] effect.

PIONEER MINING COMPANY. [Seal]

By L. STEVENSON, Mgr.,

Principal.

L. STEVENSON. [Seal]

G. P. GOGGIN. [Seal]

United States of America,  
Cape Nome Precinct,—ss.

L. Stevenson and G. P. Goggin, being first duly sworn, each for himself and not one for the other, deposes and says: That he is one of the sureties named in the above-entitled undertaking; that he is a resident of the District of Alaska; that he is not an attorney at law, marshal, deputy marshal, clerk of any court, or other officer of any court; that he is worth the sum of Three Thousand Two Hundred and Fifty Dollars over and above all his just debts and liabilities, and exclusive of property exempt from execution.

L. STEVENSON.

G. P. GOGGIN.

Subscribed and sworn to before me this 9th day of October, 1913.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

My Commission expires June 27, 1917.



ORDER. The above and foregoing Undertaking and the sureties therein named are hereby approved this 9th day of October, 1913.

Done in open court this 9th day of October, 1913.

CORNELIUS D. MURANE,  
District Judge. [44]

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tyberg et al., Defendants. Undertaking. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By J. A. B., Deputy. ———, Attys. for Plaintiff. [45]

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UNITED STATES OF AMERICA.

*District Court, District of Alaska, Second Division.*

No. 2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG et al.,

Defendants.

**Praeipce [for Transcript of Record on Appeal].**

To the Clerk of the Above-entitled Court:

You will please make and forward to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, transcript on appeal in the above-entitled action, including summons, complaint, amended complaint de-

murrer to original complaint, demurrer to amended complaint, minute orders sustaining demurrers June 28, 1913 and Aug. 9, 1913, opinion sustaining demurrer judgment of dismissal, minute orders of Aug. 18, 1913, overruling plaintiff's motion for an injunction *pendente lite* and dismissing the order to show cause and the restraining order made and issued with the order to show cause; the motion and affidavit attached, for an injunction *pendente lite* and the order to show cause with restraining order, bill of exceptions, assignment of errors, petition for appeal, order allowing appeal, undertaking on appeal, with original citation and order extending time to docket appeal, all duly certified.

G. J. LOMEN,  
Attorney for Plaintiff.

[Endorsed]: Cause No. 2425. District Court, District of Alaska, 2nd Division. Pioneer Mining Co., Plaintiff, vs. Johan Tiberg et al., Defendants. Praecipe. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attys. for Plff., Nome, Alaska. [46]

[**Certificate of Clerk U. S. District Court to  
Transcript.**]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 46, both inclusive, are a true and exact transcript of the Summons, Complaint, Motion for Injunction *Pendente Lite*, Affidavit in Support of Motion, Order to Show Cause and Temporary Restraining Order, Demurrer, Court Minutes of June 28 1913 (Sustaining Demurrer, etc.), Opinion, Amended Complaint, Demurrer to Amended Complaint, Court Minutes of August 9, 1913 (Sustaining Demurrer, etc.), Judgment, Court Minutes of August 18, 1913 (Denying Injunction *Pendente Lite*, etc.), Bill of Exceptions, Assignment of Errors, Petition for Allowance of Appeal, Order Allowing Appeal and Fixing Amount of Bond, Undertaking on Appeal, and Praecipe for Transcript on Appeal, in the case of Pioneer Mining

Company, a Corporation, Plaintiff, vs. Johan Tiberg et al., Defendants, No. 2425—Civil, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation and original Order Enlarging Time to File and Docket Transcript on Appeal in the above-entitled cause are attached to this transcript.

Cost of transcript \$18.45, paid by G. J. Lomen, of attorneys for plaintiff.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 14th day of October, A. D. 1913.

[Seal]

J. SUNDBACK,  
Clerk. [47]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TYBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

## Citation [on Appeal (Original)].

United States of America,

District of Alaska,—ss.

The President of the United States of America to  
Johan Tyberg, *alias* Edwin Johanson, and John  
Sundback, as Clerk of said Court, Defendants,  
Greeting:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this citation, and on the 6th day of November, 1913, pursuant to an order allowing appeals herein entered in the office of the Clerk of the District Court for the District of Alaska, Second Division, from the final judgment and decree filed and entered herein on the 18th day of August, 1913, and from the order of said Court denying plaintiff's motion for an injunction *pendente lite* herein entered on the 18th day of August, 1913, and from the order discharging the order to show cause why an injunction *pendente lite* should not be granted, [48] dated August 18th, 1913, and from the order discharging the restraining order made and issued with said order to show cause, in that certain suit wherein you, the said John Tyberg, *alias* Edwin Johanson, and John Sundback as Clerk of said Court, were defendants, and the said Pioneer Mining Company was plaintiff, to show cause, if any there be, why the said final judgment and decree rendered against said plaintiff, and the



said orders above mentioned and mentioned in the order allowing appeals therefrom, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 9th day of October, 1913.

CORNELIUS D. MURANE,  
District Judge.

ATTEST my hand and seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's office at Nome, Alaska, this 9th day of October, 1913.

[Seal]

J. SUNDBACK,  
Clerk of the United States District Court for the District of Alaska, Second Division.

By J. Allison Bruner,  
Deputy.

Service of the above and foregoing citation is hereby acknowledged by receipt of copy this 9th day of October, 1913.

GEORGE B. GRIGSBY,  
Attorney for Defendants John Tyberg, *alias* Edwin Johanson, and John Sundback as Clerk of said Court.

Service admitted of copy foregoing this Oct. 9, 1913.

B. S. RODEY,  
U. S. Atty.,  
For John Sundback, Clerk of Court. [49]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2425.

PIONEER MINING COMPANY, a Corporation,  
Plaintiff,

vs.

JOHAN TYBERG, *alias* EDWIN JOHANSON,  
and JOHN SUNDBACK, as Clerk of Said  
Court,

Defendants.

**Order [Enlarging Time to December 5, 1913, to File  
Record on Appeal, etc.]**

On motion of G. J. Lomen, attorney for plaintiff  
above named, and good cause appearing to the Court  
therefor,

IT IS ORDERED that the time for filing and  
docketing the transcript on appeal of the above-en-  
titled cause in the United States Circuit Court of Ap-  
peals for the Ninth Circuit, in San Francisco, in the  
State of California, is hereby extended to and until  
the 5th day of December, 1913.

Done in open court this 9 day of October, 1913.

CORNELIUS D. MURANE,  
District Judge.

Service of the foregoing order is hereby admitted, this 9th day of October, 1913. Also assignment of errors, petition for allowance of appeal, order allowing appeal, and undertaking.

GEORGE B. GRIGSBY,  
Attorney for Defendant John Tyberg, *alias* Edwin  
Johanson.

B. S. RODEY,  
U. S. Attorney,  
For Defendant John Sundback, as Clerk of said  
Court. [51]

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tyberg et al., Defendants. Order Enlarging Time to December —, 1913. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By J. A. B., Deputy. [52]

[Endorsed]: No. 2338. United States Circuit Court of Appeals for the Ninth Circuit. Pioneer Mining Company, a Corporation, Appellant, vs. Johan Tyberg, *alias* Edwin Johanson, and John Sundback, as Clerk of the District Court for the District of Alaska, Second Division, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Received October 27, 1913.

F. D. MONCKTON,  
Clerk.

Filed November 5, 1913.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

No. 2338.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PIONEER MINING COMPANY, a  
corporation,

*Appellant,*

vs.

JOHAN TYBERG, alias EDWIN JO-  
HANSON, and JOHN SUNDBACK,  
as Clerk of the District Court for the  
District of Alaska, Second Division,

*Appellees.*

## BRIEF OF APPELLANT.

This is an action in equity instituted by the appellant as the owner of stolen property—namely, gold dust, nuggets and amalgam, to have declared and enforced a trust in the proceeds of such gold dust, nuggets and amalgam, converted by the appellee, Johan Tyberg, the alleged thief, into cash in the sum of \$5,345.02, and a draft drawn by the Union Savings and Trust Company on the First National Bank of Portland, Oregon, payable to said Tyberg under the *alias* Edwin Johanson, which cash and draft upon the



arrest of the appellee, Tyberg, was deposited with appellee, John Sundback, Clerk of the United States District Court of Alaska, Second Division, who caused the said draft to be converted into its face value, \$9,000.00 in money, and holds the full amount of \$14,345.02 subject to the order of the said Court.

The original bill was filed on the 28th day of October, 1912 (Tr., 3-7). Thereafter the Court sustained a demurrer (Tr., 12-13) thereto, to which its written opinion relates (Tr., 12-24), and an amended complaint being filed (Tr., 25) a demurrer thereto on the ground that it did not state facts sufficient (Tr., 31) was sustained (Tr., 33), the Court entering a judgment of dismissal of the bill (Tr., 33-4) without opinion, on August 18, 1913, and also on said day made an order denying the prayer for an injunction *pendente lite* and ordered that the preliminary restraining order theretofore made be dissolved. From said judgment and orders of the Court the appeal is prosecuted and appellant assigns the following errors, to wit:

### SPECIFICATIONS OF ERROR.

1. The Court erred in sustaining the demurrer of the defendant, Johan Tyberg, to the original complaint in said action.
2. The Court erred in sustaining the demurrer to the amended complaint in said action.
3. The Court erred in granting defendant's motion dismissing plaintiff's complaint.

4. The Court erred in entering judgment dismissing plaintiff's complaint.

5. The Court erred in denying plaintiff's motion for an injunction *pendente lite*.

6. The Court erred in discharging the order to show cause why an injunction *pendente lite* should not be made.

7. The Court erred in discharging the restraining order granted in said order to show cause why an injunction should not be granted.

### ARGUMENT.

The main question to be presented for the consideration of this Court was the error of the Court below in sustaining the general demurrer to the amended bill and in dismissing the same. All other errors must stand or fall upon what this Court holds relative thereto.

We will therefore proceed to examine the allegations of the bill as to their sufficiency to state a cause of action in equity.

It appears therefrom briefly that Tyberg was in the employ of the plaintiff in July, 1910, as foreman of the night shift—on the Winter Fraction Placer Claim in Nome, Alaska, belonging to plaintiff, and had the *custody* and *care* as the foreman and employee of the plaintiff of sluice boxes and gold-dust, nuggets and amalgam contained therein belonging to the plain-

tiff, it being his duty to protect and safeguard the same and not to remove the sluice boxes or permit their contents to be removed. That while so employed Tyberg wrongfully and unlawfully took and carried away from the said sluice boxes, gold dust, nuggets and amalgam of the value of fifteen thousand dollars, concealed the same and converted it to his own use; and in September of the same year, after retorting the amalgam, took it to the United States assay office in Seattle, State of Washington, and received a certificate representing its value in \$14,345.02. That during said month Tyberg, alias Edwin Johanson, sold said certificate to the Union Savings & Trust Company at Seattle, receiving therefor \$5,345.02 in cash and a draft on the First National Bank of Portland, Oregon, payable to Edwin Johanson or order, in \$9,000.

That during the same month Tyberg was arrested by a deputy United States Marshal in Seattle for larceny in stealing the gold dust, amalgam and nuggets from the plaintiff, and the money and draft aforesaid being in his possession, were seized as the proceeds of the stolen property, and were transmitted to John Sundback, the Clerk of the United States District Court of Alaska, Second Division, who had the draft cashed and held the proceeds for and on account of the case of *United States vs. Tyberg*, then adjudicated.

That Tyberg is *insolvent* and not an inhabitant of Alaska; and that the only interest Sundback has is to hold the same for the benefit of the true owner sub-

ject to the orders of the Court. That Tyberg has demanded by oral motion to the Court that the said moneys be returned to him and unless he is restrained, will demand and claim the return to him of the proceeds of the said stolen gold dust, nuggets and amalgam held by Sundback.

That by reason of the foregoing, a constructive trust has attached to the said proceeds of the stolen gold dust, nuggets and amalgam and a lien should be declared on said proceeds in favor of the Pioneer Mining Company, and Tyberg should account to plaintiff in the sum of \$14,345.02.

That the acts and threatened acts of Tyberg are in violation of plaintiff's rights and if the said moneys are paid to Tyberg, plaintiff will suffer irreparable loss and injury and any judgment rendered in favor of plaintiff would be ineffectual.

The prayer asks judgment for \$14,345.02, that plaintiff be adjudged to have a specific lien on the proceeds of said stolen property in Sundback's hands to that extent less the Clerk's fees, and that the same be declared a trust fund. That pending the determination of the suit the said proceeds be placed in the registry of the Court and that in the meanwhile the defendant Tyberg, his attorneys, etc., be restrained from demanding or receiving the same.



These allegations state a cause of action in equity in that they show the existence of certain personal property belonging to the appellant; the fact that this property was in the care and custody of the defendant Tyberg under a trust to preserve and protect the same, its theft by Tyberg; its conversion of the same into other property traced directly into certain moneys and drafts found in his possession; his arrest for the theft; the taking of the property from him by the United States Marshal and the deposit of the same with the Clerk of the Court in the case of *United States vs. Tyberg*, being the criminal action instituted against him for the larceny; the adjudication of the said criminal action, the insolvency of Tyberg, the fact that Tyberg had made an oral motion to the Court to have the property turned over to him and that if the Court did not restrain him from receiving and the clerk from giving the property on deposit with him to Tyberg, Tyberg would regain possession of the property on deposit with the Clerk of the Court and we would be deprived of our property and any judgment rendered in the action would be ineffectual.

In maintaining the jurisdiction of the Court sitting in equity over the case presented by bill and that the same stated a cause of action, we contend:

Where property is obtained from another by fraud, either through the crime of larceny, or other more complex manner of theft, equity recognizes the ownership to be in him from whom it has been so fraudu-



lently obtained, and a court of equity will impress a trust upon the proceeds of such stolen property and the same may be reclaimed by the owner wherever they may be found in the hands of either a voluntary assignee, a depository, or in the possession of any one holding in bad faith.

In this case the holding of the Clerk must be treated as that of a depository for the true owner.

“A constructive trust arises wherever another’s property has been wrongfully appropriated and converted into a different form. If one person having money or any kind of property belonging to another in his hands, wrongfully uses it for the purchase of lands, taking the title in his own name, . . . or if an agent or a bailee wrongfully disposes of his principal’s securities and with the proceeds thereof purchases other securities in his own name,—*in these and all similar cases equity impresses a constructive trust upon the new form or species of property not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosoever hands it may come except into those of a bona fide purchaser for value and without notice; and the Court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has been thus defrauded. . . . Wherever one person has wrongfully taken the property of another and converted it into a new form, . . . the trust arises and follows the proceeds.*”

*Pomeroy’s Eq. Jur.*, Sec. 1051, Vol. 3.

“Whenever the legal title to property, real or personal, has been obtained through actual fraud

. . . *concealments* . . . or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests, equity impresses a constructive trust upon the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have any legal estate therein; *and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer or in the hands of any subsequent holder* until the purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts which are termed *ex malefacio* or *ex delicto*, are practically without limit. . . ."

*Id.*, Sec. 1053.

*U. S. vs. Carter*, 172 Fed., 1.

*U. S. vs. Carter*, 217 U. S., 49 (54 L. Ed., 769).

Under the facts disclosed by the bill, appellant had no remedy by motion or petition to the Court under the provisions of Sections 2374-8 of Chapter Thirty of the Code of Criminal Procedure, Compiled Laws of Alaska. An examination of Chapter Thirty (which is entitled "of the disposal of property stolen or embezzled") will disclose that it refers entirely to the *actual property* stolen, in specie, and that no provision is made for the return of the proceeds of the property in any such proceeding, even if as we believe, this bill might be treated as in the nature of such motion or petition.

The same reasoning would certainly apply against an action in replevin. And in view of the fact that we allege the *insolvency* of Tyberg, any other legal remedy would be fruitless and therefore inadequate.

*Newton vs. Porter*, 69 N. Y., 133;

*Aetna Indemnity Co. vs. Malone et al.*, 131 N. W., 200.

And in any event the legal remedy, if such there was, would not be exclusive.

See

*Chavez vs. Meyer* (N. M.), 85 Pac., 233; 6

L. R. A. (N. S. 793 and note),

where suit was brought to impress a trust upon certain mortgage securities alleged to have been taken in exchange for moneys belonging to the plaintiff; the point was made that the suit could not be maintained because there was an adequate remedy at law. The Court said:

“The character of the action is one peculiarly of equity cognizance as a part of the original chancery jurisdiction. The remedy by attachment or garnishment or both is not a common law one, but rests upon statute. *It is well settled that the fact that the statute may have given an additional remedy does not oust the courts of pre-existing inherent equity jurisdiction* affording the same result in the absence of words in the statute prohibitive of concurrent jurisdiction.”

Citing

*Pomeroy on Eq. Jur.*, Sec. 276.

See also,

*Borchert vs. Borchert*, 113 N. W. (Wis.), 35,

where the Supreme Court of Wisconsin said:

"The point is made that the pleader intended to state a cause of action to establish a constructive trust and for an accounting, and that the facts alleged are not sufficient, in that it appears that the subject of the trust no longer exists, therefore only a personal action will lie. There are three answers to that proposition. One . . . Two: An action lies to establish a constructive trust and to recover the subject thereof *where the property wrongfully obtained in specie or in its converted form still remains in the possession of the wrongdoer*; Three: In case of a constructive trust, an action lies in equity for its establishment and for an accounting *even though the property wrongfully obtained is personal and in specie or in some new form in which it can be definitely traced, is within the reach of a plain remedy at law, where it is necessary in order to obtain complete justice for equity jurisdiction to deal with the situation.*"

In its opinion rendered upon the demurrer to the original complaint the Court distinguished the case of *Aetna Indemnity Co. vs. Malone et al.*, *supra*, from the case at bar by the fact that the thieves had been *convicted* and that the controversy was between other parties. The thieves were made defendants in the



suit, and whether or not they were convicted would be immaterial. So far as the complaint, either original or amended, is concerned in this case, nothing is shown as to whether or not Tyberg was convicted or acquitted. Both complaints are silent on that point and the fact one way or the other is not relevant upon the question of whether a constructive trust was shown under the allegations of the bill or whether such a bill may be maintained.

The English rule is stated by Lord Ellinborough as follows:

“The law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be disposed of before the proper criminal tribunal in order that the justice of the country may be first satisfied in respect to the public offense and *after a verdict either of acquittal or conviction a civil action may be maintained.*”

*Cooley on Torts*, 3d Ed., Vol. 1, p. 151.

Says the Supreme Court of Florida in the case of *Williams vs. Dickenson*, 9 Southern, pp. 847-9:

“In this country the doctrine of the suspension of the civil remedy in cases of felony has been repudiated by the great weight of the American authorities. Under the system of laws prevailing in the United States the reasons for this rule are entirely absent. Here we have a public officer whose duty it is to prosecute all offenders against the state without reliance upon the injured individual, and here we have no forfeiture of the felon's goods. The civil and the criminal prosecution may there-



fore go on *pari passu* or the one may precede or succeed the other; or, if the criminal prosecution is never commenced at all, the failure to seek public justice is no bar to the private remedy. *Neither is an acquittal or a conviction upon the criminal charge any bar to the civil action."*

### Citing

*Pettingill vs. Rideout*, 6 N. H., 454;  
*Blassingame vs. Glaves*, 6 B. Mon., 38;  
*Railroad Corp. vs. Davis*, 1 Gray, 83;  
*Hawk vs. Minnick*, 19 Ohio St., 462;  
*Newell vs. Cowan*, 30 Miss., 492.

If then the offense against the dignity of the State need not first be disposed of, how can it be said that the question of either acquittal or conviction is pertinent in this case?

It must be borne in mind that we are not here dealing with the sufficiency of *proof* upon bill, answer and testimony to create a trust, but simply to determine whether or not the allegations of the bill as admitted by the demurrer, are sufficiently clear to set up a constructive trust in favor of the plaintiff in the proceeds of the stolen property, on deposit with the Clerk. And among the allegations necessarily admitted by the demurrer are those of the larceny by Tyberg of the gold dust, nuggets and amalgam and that the moneys in the Clerk's hands *are the proceeds* thereof, and that they belong to the appellant.

It would certainly seem that the essential facts are

sufficiently alleged to sustain a bill to establish a constructive trust in favor of the appellant, and if they can be sustained by proof will entitle it to the relief it seeks.

This would appear from the following cases, viz:

- Chavez vs. Meyer, supra*;  
*U. S. vs. Carter*, 172 Fed., 1; *Id.*, 217 U. S., 54,  
 L. Ed., 769;  
*Newton vs. Porter*, 5 Lans., 416;  
*Newton vs. Porter*, 69 N. Y., 133;  
*Lightfoot vs. Davis*, 198 N. Y., 26; 29 L. R. A.  
 (N. S.), 119;  
*Aetna, etc. Co. vs. Malone*, 131 N. W., 200;  
*Jaaffe vs. Weld*, 139 N. Y. S., 1101;  
*Borchert vs. Borchert, supra*;  
*Bishop vs. Howe*, 117 N. Y. S., 976;  
*American Sugar Ref. Co. vs. Fancher*, 145  
 N. Y., 552; 27 L. R. A., 757;  
*Holmes vs. Gilman*, 20 L. R. A., 566;  
*Bosworth vs. Allen*, 55 L. R. A., 751;  
*Nebraska Nat'l Bk. vs. Johnson*, 71 N. W., 295.

The amended bill shows a trust relation between the plaintiff and defendant in that it appears that Tyberg had "the care and custody of said sluice boxes, gold dust, nuggets and amalgam therein," and it is further alleged that it was his duty "to protect and safeguard the same," and not to remove or permit to be removed therefrom the valuable contents of the sluice boxes.

The main reason given by the Court below in deciding against the original complaint was that no fiduciary relation was shown. In the amended complaint, however, this omission was supplied. But if the allegations of the bill were not sufficient to show any fiduciary relation to exist, they would still be sufficient to establish a constructive trust.

*Nebraska National Bank vs. Johnson, supra;*  
*Lightfoot vs. Davis, supra;*  
*National Mahaiwe Bank vs. Barry, 125 Mass.,*  
 20;  
*Newton vs. Porter, supra.*

In the case of *Nebraska National Bank vs. Johnson*, a man employed as the janitor of the bank and to watch over and guard to the best of his ability the property of the bank so far as such duties would allow, managed to appropriate from time to time moneys aggregating \$5000 from the bank's moneys and purchased real property with the same. The action was brought to declare a trust in favor of the bank on the property purchased. The argument was made that equity did not have jurisdiction because no fiduciary relationship was shown to exist. Upon this point the Court say: (We quote at some length.)

"The other questions discussed are (1) whether the relation of the parties towards each other was a fiduciary one, in the sense in which that term is understood and employed by courts of equity; (2) whether, *assuming, as claimed that the evidence*

*fails to establish any such relation of trust and confidence, will equity interfere for the purpose of declaring in favor of the injured party a trust with respect to property purchased by a thief with the fruits of his larceny?*

“It has been held that no trust results in favor of the owner with respect to the proceeds of property stolen by a mere servant, and that the master is in such case restricted in his remedy to an action for damage, and to a prosecution of the thief in a court of criminal jurisdiction. A review of the cases tending to support that view will not be attempted in this connection. *It is sufficient that the doctrine therein assailed is in our judgment indefensible on authority, and opposed to the enlightened policy of modern equity jurisprudence. The doctrine of constructive trusts as developed by courts of equity, was intended primarily as a remedy for fraud in cases where the established rules had proved wholly inadequate; and larceny under the circumstances herewith disclosed, is none the less a fraud upon the owner of the property stolen, because committed by a servant instead of one who is, in the technical sense of the term, a trustee.*”

And referring to 1 *Beach. Mod. Eq. Jur.*, Sec. 226, the Court further says:

“Speaking on that subject, it is said in a recent valuable work, that ‘the subject of constructive trusts is intimately connected with that of frauds. Indeed *the basis of all such trusts is fraud*, either actual or presumed. Rightly understood a constructive trust is only a mode by which courts of equity work out equity, and prevent or circumvent fraud and over-reaching.’ ”

The opinion of the Court in the very late case (1911) of

*Aetna Indemnity Co. vs. Malone, supra,*

reaffirms this principle, citing the foregoing case.

This was a suit to enjoin the Chief of Police and a police officer from transferring money taken by them from burglars who had stolen it from a bank, on the ground that the plaintiff had indemnified the bank against burglary, had paid the indemnity and had succeeded to the rights of the bank.

The police officers and burglars were made defendants and judgment for full amount stolen was prayed for and obtained.

The Court said:

"The main purpose of the litigation as shown by the petition was to trace the stolen fund through the burglars into the hands of the police officers and restore it to the owner. *It is alleged that the burglars are insolvent* (as here). *The recovery of a judgment against them was consequently a secondary matter.* They had in their possession only a portion of the amount stolen when searched, and as to that plaintiff was seeking redress by enjoining the policemen from transferring it to others, and by establishing a constructive trust.

"In the petition there was no attempt to describe the particular denominations of the money taken from the bank or found in the hands of the burglars or the police officers. There had been opportunity to change the currency into different items. *Defendants were no less accountable because their possession grew out of a felony. Confidential rela-*



*tions are not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to stolen property. It may be traced through the thief into a different form of property and restored to the beneficial owner. In contriving means to cheat an owner out of his property a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found."*

The case of *Newton vs. Porter*, 5 Lans. (N. Y.), 416, was an equitable suit to compel an accounting of the proceeds of certain stolen bonds acquired by the defendants with notice of the plaintiff's rights and in which the Court subjected the securities in which they invested the money to a charge in favor of the owner of the stolen bonds.

In reversing the decision of the lower Court dismissing the complaint, it was said:

*"No exception is made in favor of a person who occupies no fiduciary relation to another and the elementary books generally do not notice any exception from the rule where the money or property has been obtained by means of a felony. It would certainly be an anomaly in the history of legal proceedings and a grave reflection upon the administration of justice, if a felon could invest the fruits of his crime or dispose of them in such a manner as to place them beyond the reach of the law."*

*"The Court should not refuse to allow a party to recover the avails of property stolen from him on any technical grounds when the merits of the case clearly require that he should recover and the Court should jump all the technicalities and be as astute in discovering a remedy for upholding the*

rights of such a party as the thief is in contriving ways and means to cheat him out of his property and the avails of it by changing the same from one kind to another, and placing it in the hands of third persons."

The Court of Appeals in upholding this decision emphatically says:

"It is insisted by counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property, and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by *felony* has been converted into other property. There is, it is said, in such cases, no trust relations between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. *It would seem to be an anomaly in the law, if the owner has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it has been converted, than one, who by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of the trust property has been confided. The law in such a case will raise a trust in invitum out of the transaction for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense.*"

*Newton vs. Porter*, 69 N. Y., 133.

In the case of *American Refinery Co. vs. Fancher*, *supra*, the principle of *Newton vs. Porter*, is affirmed

by the New York Court of Appeals where it says (citing the latter case):

“The jurisdiction of a court of equity to *follow the proceeds of property taken from the true owner by felony . . . and converted into property of another description* and to permit the true owner to take the property in its altered state as his own . . . so long as the rights of *bona fide* purchasers do not intervene, has been frequently exerted and is a jurisdiction founded upon the plainest principles of reason and justice.”

And says further:

“In the cases of *stolen property* or of misapplication by a trustee or agent of the funds of the principal or *cestui que* trust, the title of the real owner of the property has been in most cases lost, without his consent, and the Court *by a species of equitable substitution repairs as far as practicable, the wrong and prevents the wrongdoer from profiting by his fraud.*”

In the still later case of

*Lightfoot vs. Davis, supra,*

the same Court reiterates, in a well considered opinion, the principle that equity has jurisdiction of a suit to reach the proceeds of property which a thief has turned into cash, declaring that he holds them in trust for the true owner, saying:

“The method by which equity proceeds in all these cases is to turn the wrongdoer into a trustee.”

and says that cases of that character

“are to be distinguished from that large class, often that of principal and agent, in which it is held that an accounting in equity will not lie, and that the accounting must be had in an action at law. In such cases there exists merely a debt from one party to another, while in those of the former class, *the property or fund itself belonging to the claimant, he is entitled to follow the proceeds as long as he may be able to identify them, or failing that, to recover not only the amount of the fund but also any profit acquired by its wrongful appropriation.*”

The allegations of the amended bill deemed admitted by the demurrer, bring this case within the rule of the foregoing authorities. Certainly they are sufficient to show for the purposes of the demurrer that the stolen property was converted into the funds in the possession of the Clerk. And the only limitation to the rule laid down in the text-books and decisions that equity will impress a trust upon property wrongfully appropriated *wherever it may be found* so long as it may be identified in its original or any new form into which it has been converted by the wrongdoer, is where it has passed into the hands of a *bona fide* purchaser for value and without notice.

Take the bill as a whole, and under the principles discussed in the cases cited, how can there be any doubt as to the allegations being adequate to bring the case within the beneficial and far-reaching doctrine of constructive trusts by which a court of equity both pre-



vents and punishes fraud by taking from the wrongdoer the fruits of his wrongdoing and where, as here, his insolvency is admitted, leaving no adequate remedy at law? At least they are sufficient to entitle plaintiff to its day in court and to preserve the *res* pending such day.

If the bill states a cause of action in equity, then the appellant was entitled to further invoke the equitable powers of the Court to *preserve* the property in *statu quo* pending a determination of the questions involved and its restraining order *pendente lite* was an order rightfully made and should have been allowed to stand. The right to the injunctive order was necessarily dependent upon the right to maintain the action. If the Court was correct in its ruling on the demurrer, the injunctive order falls as of course. If the Court was, as we believe and assert, entirely wrong in its conclusions, its decision should be reversed and the injunctive order re-instated *pendente lite*.

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United States

Circuit Court of Appeals

For The Ninth Circuit

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PIONEER MINING CO.,  
Appellant,

vs.

JOHAN TIBERG and JOHN  
SUNDBACK, as clerk,  
Appellees.

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No. 2338

BRIEF OF APPELLEE JOHAN TIBERG

ON MOTIONS

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The appellee, Johan Tiberg, has pending six motions which have been continued by the court, as well as noticed by the appellee, for hearing on the date fixed by the court for regular hearing on this appeal. For convenience, we present the

argument on each one of these motions under the same cover as the brief on the merits. In doing so, we specifically reserve all rights under these motions and do not waive the motions or any of them.

## I.

### MOTION TO DISMISS APPEAL.

The first motion is a motion to dismiss the appeal and has three subdivisions; (a) that no appeal in this case lies except to the Supreme Court of the United States, and this court is without jurisdiction in the premises; (b) that the transcript in this case is not properly certified; (c) that the record before the court shows an attempt to review an order and the evidence used at the hearing in the lower court is not included in the record brought to this court. We argue each of these subdivisions separately.

(a) *The appeal in this case should have been to the Supreme Court of the United States.*

This court held in *Shields v. Mongollon Exploration Co.*, 70 C. C. A. 123, that Alaskan appeals are governed by the civil code for Alaska, saying:

“But the appellate jurisdiction of this court over appeals and writs of error from the Dis-

trict Courts of Alaska is not ruled by the act of April 7, 1874, but by Chapter 51 of the act of June 6, 1900, providing a civil code for Alaska (31 Stat. 414)."

Of course at the present time, the appellate jurisdiction is ruled by the act of March 4, 1911, 36 Stat. L. Secs. 1134 and 1158. These sections are given as Sections 1336 and 1337 of the "Compiled Laws of the Territory of Alaska." So far as applicable, these sections read:

"Section 1336. Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the District Court for the District of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: \* \* \* in *all* cases which involve the construction or application of the Constitution of the United States, \* \* \*.

"Section 1337. In all cases *other* than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in Section thirteen hundred and thirty-six, \* \* \* writs of error and appeals shall be from the District Court for Alaska or from any division thereof, to the Circuit Court of Appeals for the Ninth Circuit \* \* \*."

any possible argument it could be applicable, reads:

“That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: \* \* \* (4) in any case that involves the construction or application of the Constitution of the United States. \* \* \*.”

The general intention of the act of March 3, 1891, was to distribute the appellate jurisdiction and to permit an appeal to only one court. In *Robinson v. Caldwell*, 165 U. S. 359, 41 L. Ed. 745, the court said:

“It was not the purpose of the judiciary act of 1891 to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals.”

See also, *Carter v. Roberts*, 117 U. S. 496, 44 L. Ed. 861;

*Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290, 46 L. Ed. 546;

*C. H. & D. R. Co. v. Thiebaud*, 177 U. S. 615, 44 L. Ed. 911;

*Loeb v. Trustees of Columbia Township*, 179 U. S. 472, 45 L. Ed. 280.



Where a case is controlled by the construction or application of the Constitution, an appeal lies direct to the Supreme Court. In *C. H. & D. R. Co. v. Thiebaud*, 177 U. S. 615, 44 L. Ed. 911, the court said:

“In *Carter v. Roberts*, 177 U. S. 496, it was held that when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court.”

It is settled law that an appeal lies to the Supreme Court even though the constitutional question involved is not the sole question on the appeal.

*Hastings v. Ames*, 15 C. C. A. 628.

Where the record shows that the case really and substantially involves the application or construction of the Constitution, the jurisdiction of the United States Supreme Court is exclusive. In *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 45 L. Ed. 859, the court said:

“As, however, a case so arises where it appears on the record, from plaintiff’s own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law or treaty of the

United States, (*Little York Gold Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. Ed. 276, 20 Sup. Ct. Rep. 222; *Western U. Teleg. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 44 L. Ed. 1052, 20 Sup. Ct. Rep. 867), and as those cases fall strictly within the terms of Section 5, the appellate jurisdiction of this court in respect to them is exclusive.”

In *Union & Planter's Bank v. Memphis*, 189 U. S. 71, 47 L. Ed. 712, the court said:

“Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under Sec. 5 of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547, and not to the circuit court of appeals. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. Ed. 859, 21 Sup. Ct. Rep. 646. Nevertheless, an appeal having been prosecuted to the latter court, and having there gone to decree, an appeal was allowed to this court because the judgment was not made final in that court by Sec. 6 of the act. But because the case being here, and the jurisdiction of the circuit court having depended on the sole ground that it arose under the Constitution, we

are constrained to reverse the decree of the circuit court of appeals, not on the merits, but by reason of the want of jurisdiction in that court. If this were not so, the right to two appeals would exist in every similar case, notwithstanding, as we have repeatedly held, that such was not the intention of the act." (Citing cases).

See also *Filhiol v. Maurice*, 185 U. S. 108, 46 L. Ed. 827.

The record in this case does show, within the language of the *American Sugar Refining Co.* case, *supra*, that the appellant's complaint really and substantially raises a question concerning the application and construction of the Constitution of the United States; that this question, while not the only one in the case, is controlling and the judge of the District Court based his opinion largely on that question. This case is not within the line of decisions in which it has been held that where the jurisdiction of the lower court depended entirely on a diversity of citizenship, and there was also involved a question of the construction or application of the Constitution, an appeal would lie to this court. The case is within the ruling of the *Union & Planters Bank* case, *supra*, in which the Supreme Court reversed the case and ordered its dismissal by the Circuit Court of Appeals for the reason that the Circuit Court of Appeals had no jurisdiction.

(b) *The transcript in this case is not properly certified.*

The certificate (R. 50) reads:

“I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 46, both inclusive, are a true and exact transcript of the Summons, Complaint, Motion for Injunction *Pendente Lite*, Affidavit in support of Motion, Order to Show Cause and Temporary Restraining Order, Demurrer, Court Minutes of June 28, 1913 (Sustaining Demurrer, etc.), Opinion, Amended Complaint, Demurrer to Amended Complaint, Court Minutes of August 9, 1913 (Sustaining Demurrer, etc.), Judgment, Court Minutes of August 18, 1913 (Denying Injunction *Pendente Lite*, etc.), Bill of Exceptions, Assignment of Errors, Petition for Allowance of Appeal, Order Allowing Appeal and Fixing Amount of Bond, Undertaking on Appeal, and Praecipe for Transcript on Appeal, in the case of Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tiberg et al., Defendants, No. 2425—Civil, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska.”

Under that certificate, the transcript is nothing more nor less than *a bundle of certified copies of papers appearing among the files in the office of the*

Clerk of the District Court. Sections 698, 750 and 997 R. S. and Rule 14 of this court, require an authenticated transcript of the record, so far as the same may be necessary on the hearing of the appeal. Section 750 designates what shall constitute the record in the District Court. Section 698 directs that upon an appeal, in addition to the entire record as defined in Sec. 750, the transcript must contain "copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal." Sec. 997 makes the filing of an authenticated transcript as required by Sec. 698 a part of the procedure on appeal necessary to give this court jurisdiction. Rule 14 of this court, in sub-divisions 1 and 3, provides:

"The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court. \* \* \* No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court shall be filed."

The complaint in this case attempts to state a cause of action for an injunction (R. 3 to 6 and 25 to 30). At the time the action was commenced,



a temporary restraining order and order to show cause was obtained which was based, as the order recites, upon an affidavit (R. 10, 11). A hearing was subsequently had upon this order to show cause, at which time, according to the printed record, there was produced on the hearing a further affidavit by Louis Stevenson and a deposition by Johan Tiberg, after which the order to show cause was submitted to the court on the record then before it which necessarily included *first*, the affidavit filed at the time the order to show cause was issued, *second*, the affidavit of Louis Stevenson filed at the hearing, and *third*, the deposition of Johan Tiberg published at the hearing; and on the record as then made up, the court denied the injunction *pendente lite* and dissolved the restraining order (R. 35). In addition to what the printed record shows, there was served and filed prior to the hearing, and used on such hearing, and considered by the court in making the order appearing in the record on page 35, affidavits on behalf of the appellee by Johan Tiberg and George Grigsby. (See affidavits of O. L. Willett and Johan Tiberg in support of the motions). This appellee demurred to the amended complaint, which demurrer was sustained and following which the appellant having refused to plead further, the final judgment of dismissal was entered. (R. 31 to 34).

The appellant appealed, as shown by its petition for the allowance of an appeal, "from said final judgment and from the whole and every part thereof, and from the said order refusing and denying to plaintiff the said injunction *pendente lite*, and from the said order discharging said order to show cause, and from the said order discharging the said restraining order." (R. 41). In its bill of exceptions, it also excepted to the order dissolving the restraining order and denying the injunction *pendente lite*. (R. 37). In its assignment of errors, it assigns *inter alia*; "5. The court erred in denying plaintiff's motion for an injunction *pendente lite*. 6. The court erred in discharging the order to show cause why an injunction *pendente lite* should not be made. 7. The court erred in discharging the restraining order granted in said order to show cause why an injunction should not be granted." (R. 39, 40). In other words, this appeal involves four things. *First*, the ruling of the court discharging the order to show cause. *Second*, the ruling of the court discharging the restraining order. *Third*, the ruling of the court denying the injunction *pendente lite*. *Fourth*, the final judgment entered by the court. Three of these four questions, that is 75 per cent of this appeal, cannot be passed upon by this court without the proofs on which the district judge made his rulings. Those proofs are necessary to the hearing of this appeal. The record itself, without the affidavits filed here on

behalf of appellee, shows that proofs were submitted to the district judge and yet *none of the proofs* is included in the transcript, and the certificate of the clerk fails even to show that he has sent up all of that which is strictly the record in the district court as defined in Sec. 750.

The procedure and practice on appeals from Alaskan courts are the same as from U. S. District Courts. Sec. 1340 Compiled Laws of Alaska, 31 Stat. L. 415. Therefore the law, whatever it is, requiring the filing of an authenticated transcript on an appeal from the U. S. District Court to this court by or before the return day applies here.

That law (Sections 997 and 698 R. S.) makes the filing of an authenticated transcript a jurisdictional prerequisite. Sec. 11 of the act of March 3, 1891, 26 Stat. L. 829, makes all of the provisions of law in force at that time regulating the methods and system of review through appeals or writs of error to the Supreme Court of the United States apply to the circuit courts of appeal, and therefore, the jurisdictional prerequisite as to filing an authenticated transcript in this court is the same as in the Supreme Court.

By Sec. 1012 R. S., appeals are made subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error, which makes Sec. 997 applicable here.

In *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91, the Supreme Court held that the filing of a record as required by law is jurisdictional; and in *Idaho etc. Co. v. Bradbury*, 132 U. S. 509, 33 L. Ed. 433, the court said:

“In order to give this court jurisdiction of an appeal or writ of error ‘an authenticated transcript of the record’ of the court below must doubtless be filed in this court at the return term.”

In *Grigsby v. Purcell*, 96 U. S. 505, 25 L. Ed. 354, referring to Sections 997 and 1012 R. S., the court said:

“Under this legislation it has long been held that if the transcript was not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal became inoperative, and the cause might, on that account, be dismissed.”

See also *Carrol v. Dorsey*, 20 How. 204, 15 L. Ed. 803; *Hill v. Railroad Co.* 129 U. S. 170, 32 L. Ed. 651; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 9 C. C. A., 468. A transcript not “properly authenticated” is simply no transcript at all and the filing of any such a transcript amounts to no more than if there had been no transcript filed. An appeal becomes void and must be dismissed where the record is not filed according to law.

*Castro v. U. S.*, 3 Wall. 46, 18 L. Ed. 163; *The Virginia v. West*, 19 How. 182, 15 L. Ed. 594; *The Lucy v. U. S.*, 8 Wall. 307, 19 L. Ed. 394; *Mesa v. U. S.*, 2 Black 721, 17 L. Ed. 350; *Caillot v. Deetken*, 113 U. S. 215, 28 L. Ed. 983. In the last cited case, the court said:

“It has been repeatedly decided by this court that where no return has been made to a writ of error by filing the transcript of the record here, either before or during the term of the court next succeeding the filing of the writ in a circuit court, this court has acquired no jurisdiction of the case, and the writ having then expired, can acquire none under that writ, and it must, therefore, be dismissed.” (citing cases).

The jurisdiction of the court over an appeal is not complete until a proper transcript has been filed. 4 Enc. L. & P. 205. The responsibility is on the appellant to furnish a complete record properly authenticated. 4 Enc. L. & P. 206. The jurisdiction of the court must appear in the record. *In Re Smith*, 94 U. S. 455, 24 L. Ed. 165, the court said:

“The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. To this rule there are no exceptions.”



This court gets jurisdiction on appeal only on the filing of a "properly authenticated record," which under Sections 698, 750 and 997 R. S. must contain and be shown by the certificate of the clerk to contain the entire record in the lower court as defined by Sec. 750 and so much of the other proofs, entries and papers on file as may be necessary on the hearing of the appeal. In the absence of a *prima facie* showing in the clerk's certificate that the transcript does comply with these requisites, the record does not show jurisdiction.

If jurisdiction does not affirmatively appear on the face of the record, the court must dismiss the appeal. As was said in *Parker v. Ormsby*, 141 U. S. 81, 35 L. Ed. 654:

"In the exercise of its power, this court, of its own motion, must deny the jurisdiction of the courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act."

The certificate of the clerk in this case does not purport in any way to show whether or not the transcript sent to this court contains the complete or even any part of the record, of the lower court as defined by Sec. 750. Neither court nor counsel can say from the clerk's certificate or the record

now in this court either that this bundle of certified copies constitutes any part of the record below or that there are not other parts of the record of the lower court that have not been brought to this court. The certificate is also silent as to whether or not the transcript sent to this court contains all, or any part of, the proofs, entries and other papers as required by Sec. 698 R. S.. On the contrary, the body of the transcript itself shows that *it does not contain all such instruments*. The clerk's certificate is also lacking in anything to excuse his failure to include the entire record or the entire proofs; entries and papers. In other words, this record is not properly authenticated and not being properly authenticated, it cannot be considered by this court as a record. In the case of *Ray v. Law*, 3 Cranch 179, 2 L. Ed. 404, a record not properly authenticated was produced before the court. Chief Justice Marshall said:

“The act of Congress points out the mode in which we are to exercise our appellate jurisdiction, and only authorizes an appeal or writ of error on a final judgment or decree. \* \* \* We can do nothing without seeing the record, and the papers offered cannot be considered by us as a record.”

This decision is applicable here because the statute (26 Stat. L. 829) makes the method and system of carrying cases to the Supreme Court applicable to this court.

In *Meyer v. Mansur*, 29 C. C. A. 465, the court dismissed an appeal in which the certificate was almost identical with the one in the present record.

In *Cutting v. Tavares*, 9 C. C. A. 401, the court held that a certificate reading "that the foregoing papers, numbered from 1 to 200, inclusive, is a true, full, and complete transcript of so much of the said record, papers, exhibits and proceedings in the said cause of ..... as now appears and is of file and of record in my office; said transcript being true and correct copies of the originals of the several papers, proceedings, depositions, files and orders therein contained as they are now of file and of record in my office" was insufficient. That was a much stronger and more complete certificate than the one in this case.

In *Ruby v. Atkinson*, 35 C. C. A. 458, a somewhat similar certificate was held insufficient.

In *Campbell v. Reed*, 2 Wall. 198, 17 L. Ed. 779, Chief Justice Chase said:

"The record before us shows no certificate that the papers contained in it are a true and correct transcript of the proceedings in the circuit court; *the appeal must, therefore, be dismissed.*"

To summarize, Sec. 997 R. S. in the light of Sec. 1012 R. S. makes "an authenticated transcript of the record" a jurisdictional prerequisite. Sec.

750 R. S. specifies what shall constitute the record in the district court. Sec. 698 R. S. makes it mandatory that a transcript of the entire record as defined in Sec. 750 shall be sent up on an appeal, and in addition thereto, so much of the other proofs, entries and papers as may be necessary on the hearing of the appeal. There is no discretion as to the sending up of the record. In this case there is nothing to show that the entire record has been sent to this court and the transcript affirmatively shows that all of the proofs, entries and papers necessary on the hearing have not been transmitted. Moreover, the certificate of the clerk fails to show that any of the papers included in the transcript were ever called to the attention of the judge or used by him in any way. They are in no way identified with the action of the trial court. The transcript here is simply a bundle of certified copies and the appeal should be dismissed.

(c) *The record shows that the appellant seeks to review an order discharging the order to show cause, dissolving the restraining order and denying a temporary injunction without bringing to this court any part of the evidence on which the District Judge based his order.*

Sub-division 3 of rule 14 of this court requires a complete record so far as necessary to a hearing here. Insofar as three out of the four questions sought to be reviewed are concerned, there is not

only no "complete record" in this court, but there is absolutely no record at all. The record in this case as now made up, impeaches the good faith of the solicitors who are responsible for the condition of the record as sent here. The record shows that this suit was brought to prevent the paying over to the appellee, Johan Tiberg, of certain money in the possession of the clerk of the District Court, which money was taken from the said Tiberg at the time of his arrest on a criminal charge and to be held for use as evidence in the case. The District Judge not only denied, on evidence submitted to him, a temporary injunction, but he also sustained a demurrer to the complaint. Without such an injunction kept in force, the clerk of the lower court would be required to pay over to Tiberg the money that was taken from him. The appellant evidently, from the record, merely wants a review of the order of the lower court sustaining the demurrer, but it seeks by a pretended appeal from the orders respecting the order to show cause, restraining order and temporary injunction, to maintain the *status quo*. The only way that they could maintain the *status quo* was by appealing from the orders respecting the order to show cause, restraining order and temporary injunction and thereon get a supersedeas, the effect of which is to continue a temporary restraining order in force. At the same time, the appellant, in order to have any opportunity of



winning in this court, was under the necessity of preventing this court from getting before it as a part of the record the fact that Tiberg had been tried on the criminal charge in connection with which the money in question was forcibly removed from his person by the officers at the time of his arrest, and that on such trial he had been acquitted and discharged. Had the appellant brought to this court the evidence on which the District Judge acted, it would then have appeared from the record that Tiberg had been acquitted and that there never had been any possible trust relationship between the appellant and Tiberg. In other words, the appellant seeks the benefit of an appeal to this court from the order dissolving the restraining order and at the same time seeks to prevent this court from knowing at least one of the facts on which the order appealed from was made, to-wit; that Tiberg had been acquitted. We are convinced that the appeal, insofar as it concerns the order to show cause, restraining order and temporary injunction, is not in good faith. Certainly this court cannot review and the opposing counsel must have known that you could not review the orders of the District Judge in these particulars without having the evidence on which the District Judge acted. They have brought to this court a record that on the face of it is incomplete and is no record at all insofar as 75 per cent of the appeal is concerned. Moreover, insofar as the

record shows, it may not be even the complete or any part of the record as to the other 25 per cent of the appeal. There is absolutely nothing in the record or the certificate of the clerk to show that the transcript is a copy of the whole or any part of the record in the lower court in any particular or on any point. The clerk has simply certified that he has sent to this court correct copies of certain specified papers on file in his office. Much of what we have said in sub-division "b" of our argument on this motion applies equally to this sub-division.

In *Keene v. Whitaker*, 13 Pet. 459, 10 L. Ed. 246, a case was taken to the Supreme Court on an agreed statement of facts without any of the proceedings in the court being in the record. Among other things, the court said:

"It cannot appear, therefore, that this court has jurisdiction of the case; which is essential before it can give its judgment in any cause  
\* \* \* The 31st rule is: 'No cause will hereafter be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing, shall be filed.' The court orders this case to be dismissed."

The *Keene* case was cited and followed in *Curtis v. Petitpain*, 18 How. 109, 15 L. Ed. 280, and that case was dismissed for the same reason.

In *Redfield v. Parks*, 130 U. S. 623, 32 L. Ed. 1053, the court said:

“The transcript of the record was filed in this court on April 5, 1886. The certificate of the clerk of the circuit court to the transcript is dated March 8, 1886, and does not comply with Rule 8, sub-division 1, for it only certifies ‘that the foregoing writing, annexed to this certificate, is a true, correct, and compared copy of the original remaining of record in my office.’ It does not say, as required by the rule, that the annexed papers are ‘a true copy of the record, and of the assignment of errors, and of all proceedings in the case.’ It is quite apparent that there are papers of record in the court below, a copy of which ought to form part of the transcript. The complaint and answers are necessary to the hearing in this court, and unless a record containing them is filed here the case cannot be heard.

As was said in *Union Pac. R. Co. v. Stewart*, 95 U. S. 279, 284, it is the duty of the party who takes a writ of error ‘to see to it that the record is properly presented here.’ ”

In *Meyer v. Mansur*, 29 C. C. A. 465, the clerk's certificate was in effect precisely what the certificate is in this case. The appellees moved to dismiss the case, *first*, because the transcript was not properly authenticated, and *second*, because the record was not filed in time. The court said, *inter alia*:

“Addressing ourselves to the first ground of objection urged by the appellees, it seems clear that this court has no legal transcript before it. The clerk has certified the copies of 18 documents which were filed in the cause below, but the clerk's certificate does not go beyond attesting to the correctness of those copies, and the certificate shows in no manner that those 18 documents constitute the entire transcript of proceedings in the cause. A comparison between the clerk's certificate in this cause and the usual clerk's certificate authenticating a full transcript will show at once the plain defect in the certificate before the court. It must be borne in mind that in this case there is neither a certificate of the clerk attesting a full transcript, nor a stipulation of parties as to what documents shall constitute the necessary transcript, nor a statement by the clerk that he was guided by the appellant's solicitor in the selection of the papers necessary to constitute the transcript.

In *Hill v. Railroad Co.*, 129 U. S. 174, 9 Sup. Ct. 270, the supreme court said:

‘It is well settled by the decisions of this court that it has no jurisdiction of an appeal unless the transcript of the record is filed here at the next term after the taking of the appeal.’

Also see *Blitz v. Brown*, 7 Wall. 694.

This court, in order to maintain an appeal upon its docket, must have at least *prima facie* proof that it has a lawful transcript before it.

\* \* Where a transcript *prima facie* lawful is before the court—as in the case above cited of *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, a motion to dismiss the appeal will not be entertained, and the dissatisfied party must resort to the writ of certiorari. But when, as in the case before us, not even a *prima facie* transcript has been filed in this court, the proper action is to dismiss the appeal. Where the clerk certified to a full transcript, and it was urged that the transcript was incomplete, the supreme court held that the transcript was *prima facie* lawful, and that the deficiencies, if any, might be supplied by certiorari. The *Rio Grande*, 19 Wall. 188. Where the clerk had not appended his certificate to the transcript, the supreme court held that the remedy was not by certiorari. *Hodges v. Vaughan*, 19 Wall. 12. Rule fourteen, Sec. 3 (21 C. C. A. cxvi, 78 Fed. cxvi) of this court provides that:



‘No case will be heard until a complete record, containing in itself and not by reference all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court, shall be filed.’

See *Keene v. Whitaker*, 13 Pet. 459.

“In the case at bar the clerk’s certificate merely authenticates certain papers as being correct copies of their originals on file in the clerk’s office. We have been referred to no case, nor has our investigation discovered one, which would warrant us in holding that there is in this cause even a *prima facie* showing that the lawful transcript is before us. The appeal must be dismissed.”

This is not a case where the record on its face is complete or where the certificate of the clerk is fair on its face. If that were the fact and the appellee was questioning the correctness of the certificate of the clerk to the effect that he had sent here the full record and so much of the other proofs, papers and entries as he had been directed to send by appellant’s solicitors, then the appellee’s only remedy would be to ask for *certiorari*; because a record that is *prima facie* complete and lawful gives this court jurisdiction. In the present case, however, this court cannot acquire jurisdiction of the appeal because the certificate of the clerk is not *prima facie* correct and the record on its

face shows that it is not complete. There is nothing to show that the whole or any part of the record in the District Court as defined by Sec. 750 R. S. is before this court, and the record affirmatively shows that depositions and affidavits necessary to a hearing of three out of the four questions raised are not here. Moreover, the record affirmatively shows that this is not a case where a part of the evidence has been brought to this court, but that it is a case where none has been brought.

As applied to this entire first motion with its three sub-divisions, we quote to the court from Simkins Fed. Equity Suit (2 ed.) p. 735 *et seq*:

“Sec. 997, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 712, requires an authentic transcript of the record, and Rule 8 of the Supreme Court rules and rule 14 \* \* \* of the C. C. A., requires a true copy of the record, assignment of errors, and all proceedings in the case under the hand of the clerk and seal of the court. \* \* \* The certificate must show that the transcript is complete and not simply that the matters contained in the transcript are correct copies, \* \* \* or it must show that the record as sent up was designated by the stipulations of counsel, or that the clerk was guided by appellant’s counsel in preparing the transcript, and selecting the papers necessary to a hearing \* \* \*

### *Form of Certificate.*

I, W. R., Clerk of the Circuit Court of the United States for the ..... District of ....., in the ..... Circuit, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record, assignment of errors and all proceedings had in cause No. .... equity, wherein A. B. is complainant and C. D. is defendant, as fully as the same remains on file and of record in my office at .....

If part of the proceedings are omitted by the direction of counsel it may be stated thus: That the foregoing is a true copy of the record, assignments of error and proceedings, except that certain portions thereof are omitted by direction of appellant's counsel, the omitted portions being (designate what was omitted), etc."

### II.

#### ALTERNATIVE MOTION TO DISMISS APPEAL FROM ORDER DISCHARGING ORDER TO SHOW CAUSE, DISSOLVING RESTRAINING ORDER AND DENYING INJUNCTION PENDENTE LITE.

The second motion is in the alternative. If the court does not grant the motion to dismiss the entire appeal, then this appellee asks the court

to dismiss so much of the appeal as pertains to the 5th, 6th and 7th assignments of error as given on pp. 39 and 40 of the transcript. The order in question was made after a hearing at which evidence and a deposition were submitted to the court (R. 35, and affidavits in support of these motions). No part of this evidence has been brought to this court.

Injunctions are not granted as a matter of course, but only in the discretion of the court where an injunction is necessary to prevent irreparable injury. In *Thompson v. Nelson*, 18 C. C. A. 137, Judge Taft quoted the following language from *Duplex Printing Press Co. v. Campbell Printing Press etc. Co.*, 16 C. C. A. 220:

“The motion for a preliminary injunction necessarily involved the exercise by him (that is, of the judge below) of a sound, judicial discretion in granting or withholding it. \* \* \*. We are to consider the correctness of the order from the same standpoint as that occupied by the court granting it.”

And in the *Thompson* case the court held that the same rule applied in an appeal from an order refusing an injunction. How can this court consider the motion for a temporary injunction from the same standpoint as that occupied by the court

refusing it when none of the evidence on which the lower court acted and perhaps not even all or any part of the record, is before this court?

In *Hemple v. Raymond*, 75 C. C. A. 526, this court, speaking through Judge Gilbert, said:

“The burden is upon the plaintiff in error to show clearly and affirmatively from the record itself the facts constituting error. This rule is so firmly established as to require no citation of authorities.”

How then can this court pass upon the order of the lower court respecting the injunction? As was said by Justice Lamar, in *New York etc. Co. v. Fraser*, 130 U. S. 611, 32 L. Ed. 1031:

“To obtain a reversal of a judgment it is necessary that the fact, upon which such reversal is claimed, should appear from the record, sufficiently to be passed upon.”

Assignments of error which cannot be intelligently understood and passed upon without reference to the evidence, do not properly present anything for consideration when the evidence is not brought up. *Bond vs. Winn*, 38 S. E. (Ga.) 328.

Since there is nothing which this court could possibly consider respecting the appeal from the order pertaining to the order to show cause, restraining order and injunction *pendente lite*, we submit that so much of the appeal should be dismissed.



It will necessarily follow from the dismissal of that part of the appeal that the restraining order formally continued in effect by the supersedeas will be at an end. The appellee will thereupon become immediately entitled to receive from the clerk of the District Court the fund in question, and all possibility of any relief to the appellee, even though its complaint should state a good cause of action, will cease. Under such a state of facts, with the dismissal of the appeal, insofar as it affects the 5th, 6th and 7th assignments of error, the possibility of this court granting any relief to the appellant will have ended, and for that reason alone the entire appeal should be dismissed. The rule that the appellate court will not retain jurisdiction over a case when by so doing it cannot affect the result as to the thing in issue, is elementary. It is well illustrated in *Kimball v. Kimball*, 174 U. S. 158, 43 L. Ed. 932. That action was begun by Maude E. Kimball claiming to be the widow of Edward C. Kimball, to obtain letters of administration on the estate of the deceased. Her right to administer was contested on the ground that she was not his widow. The lower court held that her claimed marriage to the intestate was void. After the writ of error had been entered in the Supreme Court, a will of Edward C. Kimball was found and probated. On the motion to dismiss, the Supreme Court, on authorities there cited, held that when an event occurs which renders it im-

possible for the appellate court, if it should decide the case in favor of the appellant, to grant him any effectual relief whatever, the court will not proceed to a formal judgment but will dismiss the appeal. In the case at bar, the court cannot review and ought not to retain jurisdiction over the appeal from the order respecting the injunction. This makes it impossible for the court, even though you should decide in favor of the appellant on the only other question in the case, to grant it any effectual relief; and on the authority of the *Kimball* case and cases there cited, you should not proceed to a formal judgment, but should dismiss this appeal in its entirety.

### III.

#### ALTERNATIVE MOTION TO STRIKE TRANSCRIPT.

The appellee's third motion is for an order striking the transcript if the court refuses to dismiss the appeal in its entirety according to the first motion. The transcript is so fatally defective, as set out in our argument on the first motion, as not to amount to a transcript. It is merely a bundle of certified copies and is in no sense a record. In addition to the authorities already cited, we call the court's attention to:

*Hospes v. N. W. Mfg. & Car Co.*, 43 N. W.  
(Minn.) 180,  
*Davis v. Harper*, 14 App. D. C. 298,  
*Sand Point v. Doyle*, 74 Pac. (Ida.) 861,  
*Kincaid v. Friedman*, 73 Pac. (Kan.) 52,  
*Naylor v. Beery*, 81 Pac. (Kan.) 473,  
*Beck v. Holland*, 72 Pac. (Mont.) 972,  
*Burnham v. Dreggers*, 32 So. (Fla.) 796,  
*Anderson v. Long*, 37 So. (Fla.) 565,  
*Yeoman v. Shaeffer*, 57 N. E. (Ind.) 546,  
*Gripton v. Jones*, 53 Pac. (Kan.) 789,  
*Bank v. Hussey*, 50 Pac. (Kan.) 977,  
*Scott v. Brown*, 61 Pac. (Kan.) 460,  
*Barger v. Sample*, 64 Pac. (Kan.) 1026,  
*Fortune v. Parks*, 119 Pac. (Okla.) 134,  
*Territory v. Neligh*, 10 Pac. (Ariz.) 367,  
*Finnegan v. Fernandina*, 14 Fla. 72.  
*Elliott v. Deason*, 64 Ga. 63.

The certificates in many, if not most, of the above cited cases were stronger than the certificates attached to the record in this case. There may be an attempt to argue that the certificate is aided by the praecipe. That idea is expressly negatived in *Yeo-*

*man v. Shaeffer*, 57 N. E. 546. In any event, the praecipe in this case could not aid the certificate because the praecipe does not purport to ask for all of the record but simply directs the clerk of the lower court to make a transcript of certain enumerated papers and send those enumerated papers "duly certified" to this court. The clerk followed the direction of the praecipe. He was not told to send up the record. He was not ordered to certify to the enumerated papers as being any part of the record below, or as having been used at any hearing. He was ordered only to certify to the correctness of certain copies. This he has done, and the record as so prepared under all the authorities, is not sufficient. In the case of *Sand Point v. Doyle*, 74 Pac. 861, the following apt language is found:

"The transcript in this case contains no certificate showing that the papers and records it contains were used by the judge upon the hearing, but merely contains a certificate from the clerk that they are true and correct copies of the papers it purports to contain, as the same appear on file in his office. This certificate is good as far as it goes, but falls short of showing that the papers contained in the transcript were used by the District Judge upon the hearing of the motion. Many other papers and documents might have been used for aught this record shows, or many of the papers in this

transcript may not have been presented to the Judge at all. It would be a dangerous practice for this court to pass upon such appeals without having before it copies of all the papers used upon the hearing, properly identified by certificate as contemplated by statute.”

#### IV.

### MOTION TO STRIKE BILL OF EXCEPTIONS

This is an alternative motion to strike the bill of exceptions in case the court shall refuse to dismiss the appeal in its entirety, or shall refuse to strike the transcript in its entirety. The reason for the motion is that a bill of exceptions is not permitted by the federal equity practice except in those cases where some issue has been tried to a jury. The appellant cannot bolster up its record with something unknown to chancery practice. In *Southern Building & Loan Association v. Carey*, 117 Fed. 325, the court refused to sign a bill of exceptions, saying that *such a thing is unknown to and not permitted by the federal practice in equity cases*. In *Ex parte Story*, 12 Pet. 339, 9 L. Ed. 1108, Justice Taney said: “A bill of exceptions is altogether unknown in chancery practice.”



In *Continental Trust Co. v. Toledo etc. Co.*, 99 Fed. 177, this was the only question involved. The authorities are there reviewed. The court among other things said:

“I have taken pains to examine the authorities as to the duty of the trial judge in the Circuit Court of the United States to sign a bill of exceptions in an equity case. I find the authorities are overwhelming in favor of the proposition that no such thing as a bill of exceptions is known in the equity practice in the federal courts.”

In *Dodge v. Norlin*, 66 C. C. A. 425 (431), the court said:

“A bill of exceptions has no function and serves no purpose in a suit in equity or in bankruptcy. An appeal makes the entire record available to counsel for the appellant, and imposes upon him and upon the clerk of the lower court the duty of inserting in the transcript of the record sent to the appellate court everything material to the hearing of the questions to be presented there. *Teller v. U. S.*, 111 Fed. 119, 49 C. C. A. 263. The bill of exceptions must therefore be disregarded.”

See also *Morrison v. Burnette*, 83 C. C. A. 391;

*Laurel etc. Co. v. Galbreath etc. Co.*, 91 C. C.  
A. 196;

*Gorham Mfg. Co. v. Emery etc. Co.*, 43 C. C.  
A. 511;

*Simpkins Federal Equity Suit*, (2 ed.) 737.

An examination of the record discloses the purpose of the appellant in attempting to insert here a bill of exceptions. According to the record in the lower court, it failed to take exceptions in that court to the order denying the injunction *pendente lite* and dissolving the preliminary restraining order (R. 35). This bill of exceptions is a manifest afterthought, the purpose of which is to provide the appellant with grounds for an appeal that did not exist as a matter of fact.

## V.

### ALTERNATIVE MOTION TO VACATE SUPERSEDEAS.

This appellee has moved the court that in the event the court does not dismiss the appeal in its entirety, the court make an order vacating the supersedeas.

At the time of the commencement of this action, the appellant made a motion for an order requiring the appellees to appear and show cause why an

injunction should not be granted. (R. 8). On that motion and the complaint and affidavit filed therewith, an order to show cause was issued and the appellees were required to appear for that purpose on October 29, 1912. It restrained the appellees as follows: "The said Johan Tiberg, his agents and attorneys, from demanding or receiving the proceeds of said gold dust and amalgam mentioned in the complaint, and the said defendant, John Sundback, clerk as aforesaid, from delivering up to said Johan Tiberg, or his order, the said proceeds or any part thereof." *No injunction was issued and the order citing the appellees to show cause and restraining them pending the hearing did not provide for any bond.* (R. 10, 11). The record before the court is silent as to what took place on October 29, 1912. There is nothing to show that any of the parties appeared at that time or that there was any hearing or any continuance. Nothing more appears to have been done until August 18, 1913, at which time the minutes show that some unidentified order to show cause came on for hearing and that at that time the court denied an injunction *pendente lite*, and dissolved "the preliminary restraining order heretofore issued herein." (R. 35). The minutes then read: "Upon motion of Mr. G. J. Lomen, it was ordered that the property in controversy in this action remain *in statu quo*, to-wit: in the hands of the Clerk of the Court for the present and until the

further order of the Court.” (R. 36). The minutes do not show any process or notice of any kind requiring the defendants to appear on August 18, 1913; and no appearance as a matter of fact by either of the appellees or any counsel for them is shown by the record. In the order allowing the appeal, we find the following: “It is further ordered that an undertaking on appeal and to secure the defendants against damage by reason of the order heretofore made and hereby continued, be given by the plaintiffs to the defendants” conditioned among other things that the plaintiff shall answer for all costs and damages the defendants shall suffer “by reason of the order heretofore made and entered on the 18th day of August, 1913, directing said trust fund, involved in said action, to be held in *statu quo* in the hands of the Clerk of said Court, and it is further ordered that upon the filing of said bond, the order heretofore made directing the trust fund involved in said action to remain in *statu quo* in the hands of the Clerk of said Court, be, and the same is hereby continued, pending said appeal and until the further order of said court.” (R. 43, 44). This was on October 9, 1913, and there is nothing to show that the appellees had any notice that any order of any kind affecting their rights would be made at that time.

Neither the order of August 18, 1913, nor the one of October 9, 1913, provides for any notice to the appellees or any right by them to be heard at any time.

The supersedeas in this case was granted improvidently because: *first*, the order to show cause was not an injunction, but merely a restraining order; *second*, the order to show cause fell by its own limitations on October 29, 1912; *third*, it could not be appealed from; *fourth*, it could not be continued by a supersedeas; *fifth*, the *statu quo* order does not even purport to continue any restraining order; *sixth*, the *statu quo* order itself was void because (a) not on notice or process, (b) not within the issues, (c) no return day was fixed or order to show cause issued, and (d) was not within the power or jurisdiction of the court; and *seventh*, the amount of the supersedeas is so insufficient as to show abuse of discretion.

Section 1219 Comp. L. of Alaska is the statute under which the order to show cause was issued and, so far as applicable, provides "an order may be made requiring the defendant to show cause, at a specified time and place, why the injunction should not be allowed, and *in the meantime* the defendant may be restrained." That section requires no bond. Section 1216 Comp. L. of Alaska permits the issuance of a temporary injunction, but specifically provides that the court shall require of the plaintiff a bond before allowing an injunction.



There is a well-settled distinction between restraining orders and injunctions. In *Wetzstein v. Boston etc. Co.*, 63 Pac. 1043, the court ruled on a petition for an order of supersedeas where a restraining order had been granted. Under a statute providing for an appeal from an order granting or dissolving an injunction or refusing to grant or dissolve an injunction, the Montana court held that there was no supersedeas on, and no appeal possible from, a restraining order, and said:

“A restraining order is distinguishable from an injunction, in that a restraining order is intended only as a restraint upon the defendant until the propriety of the granting of an injunction, temporary or perpetual, can be determined, and it does no more than restrain the proceedings until such determination. Such an order is limited in its operation, and extends only to such reasonable time as may be necessary to have a hearing on an order to show cause whether an injunction should not issue.” (Citing cases).

The statute in that case was the same as the statute (Sec. 1339 Comp. L. of Alaska) under which this appeal is taken.

In *State v. Wakeley*, 44 N. W. (Neb.) 488, an application was made for mandamus to compel the judge of the lower court to fix the amount of a supersedeas bond in a case where a restraining order

had been issued and a temporary injunction had been denied, and the restraining order dissolved. The court held that the restraining order was not an injunction within the meaning of the statute; that a restraining order "is purely transitory, and has not within itself the elements necessary for its continuance. On a decision either granting or refusing a temporary injunction, its vitality is gone, and it ceased to be binding upon the defendants in the action. \* \* \* It simply suspends proceedings until an opportunity can be given for hearing the parties; and upon that hearing having been had, and a decision rendered upon the application, the whole force of the restraining order ceases by its own limitation. Any other conclusion would do violence to the intention of the legislature; for by it, if the contention of the plaintiff should prevail, it would enable the plaintiff in an injunction proceeding, upon a representation to a judge by petition, and such other methods as might be adopted, that great and irreparable injury would result from a failure to issue an immediate injunction, procure the restraining order mentioned by the statute, and then, in spite of the judge and the court before whom the case was heard, and even over an order directly refusing to grant an injunction, prevent the commission of the act until the case could be finally

heard in the appellate court, which was clearly not the purpose of the act of 1889." See also *Riggins v. Thompson*, 71 S. W. 14, and *State v. Baker*, 88 N. W. 124.

This restraining order ended by its own limitations on October 29, 1912. Not only did it expire by its own limitation at that time, but also for the reason that there was no hearing so far as this record shows on the return day. In *State v. Green*, 67 N. W. (Neb.) 162, where a similar question was involved, the court said: "No such hearing was had at the time designated, and therefore the restraining order, by its own limitation, ceased to have any binding force and effect, and could not be revived and continued in force by the giving of a supersedeas bond." It may be argued that the language of the order restraining the appellees "until said hearing, and until further order of the court" changes the rule. Such a claim is answered under a similar state of facts in *San Diego Water Co. v. Pacific Coast S. S. Co.*, 35 Pac. (Cal.) 651, in which the court said:

"This order contained a clause restraining the defendant 'pending this order to show cause, and until the further order of this court.' There was no appearance by either party at the time the order to show cause was returnable, nor was the motion for an injunction continued or kept alive in any mode. The restraining

order, therefore, which is only authorized to be made pending the motion, fell with the motion. \* \* \* If the phrase, 'and until the further order of this court,' could have the effect to prolong the restraining order beyond the pendency of the motion for an injunction, then it would convert the order into a preliminary injunction, which could not be operative until a bond was given."

See also *Hicks v. Michael*, 15 Cal. 107. If it be said that the record in this case does not show that there was not any appearance on October 29, 1912, we answer with *Miles v. Sheep etc. Co.*, 49 Pac. (Utah) 536, in which an order to show cause and restraining order was issued. It was contended that a restraining order which was returnable on March 2nd was still in force on November 20th. The court said: "In the absence of any such showing, we must assume that the order remained in force only until the time fixed for the hearing on the order to show cause." It may be argued that the lower court, as a matter of fact, did restrain the appellees until the further order of that court. The statute, however, Sec. 1219 Comp. L. of Alaska, permitted the court to make an order requiring the defendants to show cause "at a specified time and place" and to restrain the defendants "in the meantime". Any restraining order which purported to restrain the defendants after 1 P. M. of October 29, 1912, was void under the statute because not

within the power of the court to make. This is also apparent from *Ex parte Grimes*, 94 Pac. (Okla.) 668, a well considered case in which the restraining order in question used the language "until the further order of this court". The court held that that was simply equivalent to the language of the statute of that state reading, as does the statute here, "in the meantime."

No appeal could be taken from this restraining order or any order dissolving it. As we have heretofore shown in the argument on the first motion, an appeal can only be taken in the cases provided for by statute and the only statute on the question here that could give the right is Sec. 1339 Comp. L. of Alaska. Under the authorities above cited, that section gives no such right.

Neither the restraining order nor its force could be continued by a supersedeas. The civil code of Alaska contains no provisions respecting a supersedeas, but Sec. 1340 Comp. L. of Alaska makes all of the provisions of law in force on June 6, 1900, "regulating the procedure and practice" in cases brought by appeal or writ of error to the Supreme Court, or this court applicable to appeals from Alaskan courts. We are not, at this time, concerned with the power of this court to make an order staying the hands of every person interested pending the hearing and decision here, for this court has not been called upon to act. It can well be questioned



whether or not the act of a trial court granting a supersedeas pending an appeal is within the "provisions of law now in force regulating the procedure and practice in cases brought by appeal," but however that may be, the appellant here can claim no greater right than is given by Sec. 1007 R. S. That section, read in connection with Sec. 1000 R. S., in which the form of the bond is provided, shows that there can be no supersedeas except in those cases where the writ of error or citation on appeal "may be a supersedeas". In the case at bar, it is not possible for the citation to be a supersedeas because there is nothing to supersede or set aside. *New River Mineral Co. v. Seeley*, 117 Fed. 981. In the Slaughter House Cases, 77 U. S. 273, 19 L. ed. 915, the court said:

"It seems to be well settled everywhere, in suits in equity, that an appeal from the decision of the court, denying an application for an injunction, does not operate as an injunction or stay of the proceedings pending the appeal."

How much more is this true on an attempted appeal from an order dissolving a restraining order which is in no sense an injunction and which order fell of its own limitations some eleven months before any appeal was taken. It cannot be fairly said that the *statu quo* order of August 18th affects the rule. The case of *Hovey v. McDonald*, 109 U. S. 150, 27 L. ed. 888, well states the limits of the

power of the court in these matters. In that case a restraining order was first issued and subsequently a preliminary injunction was granted. Thereafter demurrers were sustained and the appeals dismissed. It will thus be noted that there was an injunction *pendente lite* in that case. After explaining the nature of a supersedeas and the rule in respect thereto, the court said:

“But this case is not within the terms of the rule. There was no decree for a specific sum of money; there was no decree at all in favor of the complainants; and no execution was applicable to, or could be issued in the case, excepting an execution for the costs of the defendants. The truth is, that the case is not governed by the ordinary rules that relate to *supersedeas* of execution, but by those principles and rules which relate to Chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to the *supersedeas* can only be brought in by way of analogy.”

The court then shows that it may be that the decree has an intrinsic effect which can only be suspended by an affirmative order either of the court which makes the decree or of the appellate

tribunal, and that either tribunal, if the purposes of justice require it, has the power "to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary." Attention is then called to the rule of the Supreme Court which is expressly stated to have been made in recognition of this power and for the purpose of facilitating its proper exercise in certain cases. That rule reads:

"When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by judge or justice who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party."

We believe no court has decided that the power exists in any court to make any order not strictly within the limitations of the rule laid down in the *Hovey* case. That rule is not applicable here because: *first*, it is limited to an intrinsic effect in the decree which it is possible to suspend by an affirmative order; *second*, it requires an affirmative order and therefore necessarily requires all of the prerequisites to the making of a legal order by its terms suspending that effect; *third*, it can only be

made "if the purposes of justice require it" which necessarily presupposes a right in the other party to be heard on that question; *fourth*, it can only be exercised so far as injunction cases are concerned where an *injunction* as distinguished from a *restraining order* has been granted, and *fifth*, the condition of the order must be to maintain the *status quo* "until a decision should be made by the appellate court, or until that court should order the contrary" instead of "for the present and until the further order of the (District) Court." None of these prerequisites can be found in the record before this court.

The *statu quo* order of August 18th does not even purport to continue in effect the restraining order. In fact, it is an anomalous order having neither kith nor kin in the legal family. On that day the court signed the final judgment dismissing the complaint. Then, without notice, process or appearance, so far as the record shows, but on an *Ex parte* application of the plaintiff, it was ordered that the property in controversy remain in *statu quo* "for the present and until the further order of the court". There was absolutely no order, within the language of the Hovey case, limiting the order to the time of the hearing in the appellate tribunal, or until the appellate tribunal should otherwise direct. The order of October 9th is of no more effect than the order of August 18th, because by its express terms it merely continued the order of



August 18th. It does not purport to suspend some intrinsic effect of the decree, for even the restraining order had died a natural death on October 29, 1912. That is apparent from a comparison of the terms of the complaint, the restraining order and the *statu quo* order. The restraining order restrained the defendant Tiberg from doing certain things and the defendant Sundback from doing certain other things. The *statu quo* order does not purport to do either.

The *statu quo* order is void. Tiberg filed a demurrer to the complaint on February 8, 1913, (R. 12, 13). This constituted an appearance. (Sec. 1331 Comp. L. of Alaska). Having appeared, he was entitled to twenty days' notice before the time appointed for the hearing. Sec. 1331, 1325 Comp. L. of Alaska, and *Wilson v. Blakeslee*, 16 Pac. 872. This provision of the Code is found in the laws of Oregon for 1862. By the act of Congress of May 17, 1884, this provision of the laws of Oregon was adopted into the laws of Alaska. By so doing, Congress intended that this provision should be construed in the sense in which it was understood at the time in the system from which it was taken. *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. ed. 1022. At the time of its adoption it was the settled rule in the State of Oregon that any order made without prior notice as provided by this sec-



tion was void. This appears from the decision of Justice Strahan in *Bush v. Geisey*, 19 Pac. (Ore.) 122, in which the court said, among other things:

“It is manifest from these provisions of the Code that this was a case where a notice of a motion was necessary by the express requirement of the law, and, it appearing that no notice whatever was given, the time for filing the transcript was not enlarged. The appellant took the order without such notice at his peril, and now that his right to proceed without notice is questioned, the court has no jurisdiction whatever in the matter.”

This case was decided on May 7, 1888, but the justice says that while he can find no reported case on the subject, it is within his own knowledge that such has been the practice.

It may be argued that the record fails to show that Tiberg was not given notice, but that is not sufficient. The presumption is that the lower court was without jurisdiction and its jurisdiction must affirmatively appear in the record. *King etc. Co. v. County of Otoe*, 120 U. S. 225, 30 L. ed. 623; *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. ed. 905.

Neither was the *status quo* order within the issues. The complaint never sought in any manney to keep a fund in the hands of the clerk, but sought to deprive the clerk of that possession

and deprive Tiberg of the right of possession. Where a court has power to make a *statu quo* order, it must still be within the issues. An order or judgment outside of the issues is a nullity. *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464. If the *statu quo* order can be classified at all, it must be considered in view of the temporary language used, towit, "for the present and until the further order of the court", as merely an order restraining the defendants until the plaintiff could make an application for some injunction in regular form. As a new restraining order, however, the *statu quo* order was void because, as heretofore shown, the only purpose that a restraining order can serve is to restrain the defendants for a reasonable time until a hearing on an application for an injunction can be had. The only power that the district judge had to make such an order is contained in Sec. 1219 Comp. L. of Alaska and the order does not comply therewith and was therefore without jurisdiction.

The amount of the bond was also so insufficient as to show an abuse of discretion. No doubt it was made under a belief that this case falls within rule 13 of this court. It is no part of the duties of the clerk of the District Court of Alaska to hold money even as evidence. Sec. 367 Comp. L. of Alaska. It can well be doubted that the clerk's bondsmen are responsible for the ultimate delivery of this money. Even though they are, the total amount of

that bond which must secure not only these appellees, but all other parties, is \$20,000. Sec. 376 Comp. L. of Alaska. The total bonds to which the appellees probably have a right to look in this case for the recovery of \$14,345.02 and interest at 8 per cent. (Comp. L., Sec. 684) from October 29, 1912, and all costs and damages on this appeal, is \$3250.00. (R. 45). The total possible bonds to which we can look, if it be found that the clerk's bondsmen can be held, is \$23,250.00. Principal and interest now amount to about \$16,000.00. The bond in this case is purely a personal bond. (R. 45 to 47). Under such circumstances, the courts almost uniformly have required that the bond should be in double the amount of money secured. In this case, the amount of the bond to which the appellees could certainly look is about one-fifth of the amount involved. If we include the clerk's bond, there is no way of telling just what the amount is because all other persons who have claims against the clerk could enforce their rights against the same bond. We submit that the bond is clearly insufficient.

If the supersedeas in this case has been granted without authority or the amount is so insufficient as to show an abuse of discretion, this court should vacate it. *Simpkins Fed. Eq. Suit*, (2d ed.) 714. Where the order is not appealable, the appeal is a nullity and there is nothing left on which a supersedeas can operate. *How v. How*, 5 Mass. 375. Where an injunction is purely prohibitive a super-

sedes does not continue it. *Green etc. Co. v. Norrie*, 63 C. C. A. 432. Where a restraining order has been dissolved, a party is not entitled to have the order dissolving it superseded pending review. *State v. Baker*, 88 N. W. 124; *State v. Lichtenberg*, 30 Pac. 716; *State v. Greene*, 67 N. W. 162. The record in the clerk's office will show that these motions were made promptly. They involve the right of this court to go into the merits, and we submit that they should be decided before we have any consideration of the case on its merits.

## VI.

### ALTERNATIVE MOTION FOR A WRIT OF CERTIORARI TO CORRECT A DIMINU- TION OF THE RECORD.

We believe that the foregoing motions ought to be granted and if the court does grant either the first, second or third motion, then there will be no necessity for a ruling upon this sixth motion.

We certainly do not need to present any authorities or extended argument on this motion. The appellant here seeks to review an order made by the District Judge on evidence then before him. None of that evidence has been brought to this court, as we have heretofore shown in the argument on the

other motions. That evidence is absolutely necessary to any review by this court of the order of the lower court. The motion in this case was seasonably made under rule 18. There is only one possible reason that we can imagine why this motion might be denied in the event that the court denies the first, second and third motions. That reason is that the appellant, as shown by the record, failed to take any exception to the order of the District Judge denying an injunction *pendente lite* and dissolving the restraining order. This court might properly hold that in the absence of any such exception this court could not review a discretionary order of the lower court, such as this was, even though all of the evidence were before this court.

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## BRIEF ON THE MERITS.

Not knowing just what the ruling of the court will be on the motions, we have decided to write the brief on the merits on the record as now before this court, as though no such motions were pending. We desire, however, to preserve all rights under these motions and that we shall not be deemed to have waived these motions by this brief on the merits. We are also at some disadvantage in not having the appellant's brief. The fact that



the attorneys actually writing the briefs are so far distant from each other, makes it impossible for us to hold the appellee's brief until the appellant's brief is served.

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## STATEMENT OF THE CASE.

The appellant commenced this action in equity in the District Court at Nome, Alaska, against the clerk of that court, and this appellee, Johan Tiberg. The complaint alleged that in September, 1910, Tiberg was arrested in Seattle, Washington, on a charge of crime and that at the time of his arrest the deputy United States marshal making the arrest, took from Tiberg's person \$5,345.02 in cash and a draft for \$9000.00, which Tiberg claimed as his property; that this money and draft was transmitted by the said deputy marshal to the clerk of the District Court at Nome, to be held by him in *custodia legis*; that this money and draft was the proceeds of certain gold dust claimed by the appellant to have been stolen by Tiberg from it in July, 1910; that the said clerk holds the proceeds thereof for the use and benefit of Tiberg and that Tiberg is insolvent. That complaint did not show in any way that the criminal action in connection with which the money and draft had been seized

had been terminated. (R. 3 to 7). At the time of the filing of the complaint, the appellant made a motion for an order to show cause directed to the appellees, requiring them to appear and show cause why an injunction should not issue and that in the meantime the defendants be restrained. (R. 8). An order to show cause was issued citing the appellees to appear on October 29, 1912, and show cause why an injunction should not be issued enjoining Tiberg from demanding and the clerk from paying this money. In this order to show cause the defendants were restrained "until said hearing, and until further order of the court". (R. 10, 11). The record does not show that there was any appearance by either the appellant or appellees on October 29th, or that there was any continuance or hearing of the matter at that time. On February 8, 1913, defendant Tiberg appeared in the case by filing a demurrer. (R. 12, 13). This demurrer was sustained. (R. 13, 14). In connection therewith the District Judge filed an opinion. (R. 14 to 24). Thereupon the appellant amended its complaint and as so amended the complaint alleged that Tiberg, while in the employ of the appellant, took and carried away gold dust, nuggets and amalgam to the value of \$15,000 and upward, and after retorting the same he had procured therefor \$5345.02 in cash and a draft for \$9000; that in September, 1910, he was arrested by a deputy United States marshal in Seattle, Washington, on a charge

of having committed larceny by the stealing of the gold dust, nuggets and amalgam for which he had obtained the cash and draft; that at the time of his arrest this cash and draft were found in the possession of Tiberg and were at that time seized by the deputy marshal and transmitted and delivered to the appellee Sundback as clerk of the District Court and he holds the same for the benefit of the true owner and subject to the orders and directions of the District Court at Nome and not otherwise, the draft, however, having been cashed by the clerk; that Tiberg has demanded by oral motion addressed to said court a return to him of the property so taken from Tiberg at the time of his arrest and that Tiberg threatens to demand and claim the same from the said clerk. There is, however, no allegation that the clerk will deliver this property on Tiberg's demand or that the court will make any order or direction to the clerk so to do. In fact the complaint fails to show what ruling the court made on Tiberg's motion. (R. 25 to 30). Defendant Tiberg demurred to this amended complaint and his demurrer was sustained on August 9, 1913. (R. 31 to 33). Thereafter, in said cause, a judgment of dismissal was entered in which it is recited that a demurrer had been sustained to the complaint; that thereafter the plaintiff filed an amended complaint to which a further demurrer had been sustained "and the plaintiff having failed and refused to further amend its said complaint, it is by the

court ordered, adjudged and decreed that this action be and the same hereby is dismissed." (R. 33, 34). This was on August 18th. On the same day, but whether it was before or after the cause was dismissed the record does not show, a hearing was had upon "the order to show cause why an injunction *pendente lite* should not issue" and affidavits of Louis Stevenson and Johan Tiberg were presented. Thereupon the matter having been submitted, the court made an order denying the injunction *pendente lite* and "ordered that the preliminary restraining order heretofore issued herein be dissolved." (R. 35). On September 16, 1913, the appellant served a bill of exceptions in which it is recited that a complaint was filed to which a demurrer was sustained; that the plaintiff thereupon served and filed an amended complaint to which a demurrer was sustained and "judgment of dismissal of the action and for costs in favor of defendant Tiberg, was thereupon, *plaintiff electing to stand on its complaint*, on the 18th day of August, 1913, entered." (R. 36 to 38).

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## ARGUMENT.

### THE FIRST ASSIGNMENT.

This is a claim that the court erred in sustaining the demurrer to the original complaint. After the

demurrer had been sustained, the appellant amended its complaint in an attempt to avoid the force of the opinion sustaining the demurrer. This court, in *Northern Pacific Ry. Co. v. Murray*, 31 C. C. A. 183 (187), held that where a plaintiff amended his complaint following a ruling of the court, that the action could not be maintained on the original complaint, any error in the ruling of the court was waived by the plaintiff's election to amend his complaint. You there held that it was open to the plaintiff to have stood upon his complaint or to have amended it, and said: "He was at liberty to take one of two roads, but not both; nor can he, at the same time, accept and reject the judgment under review." This well-settled rule is stated in 2 Cyc. 645 as follows:

"If a party, after judgment upon demurrer to pleadings is given against him, under leave of court, amends the pleading demurred to he acquiesces in the judgment upon the demurrer, and will not be permitted to assign it for error in the appellate court."

Any pleading in Alaska courts may be once amended without leave. Sec. 992 Comp. L. of Alaska.

If the court should adopt any other view of the first assignment, we feel we can safely submit that assignment on the opinion of the district judge with the added suggestion that since the complaint



does not show that the case of the *United States v. Tiberg* had even been brought to trial, it does not appear from that complaint that the government is not still interested in the holding of, and therefore the clerk is obliged to hold, said property for use as evidence on the trial. As the court will notice, in both the original and amended complaints, the appellant has gotten itself into some ridiculous situations simply through a lack of frankness and willingness to plead facts about which there could not be, in the nature of things, any dispute.

#### SECOND, THIRD AND FOURTH ASSIGNMENTS.

Undoubtedly if the district judge did not commit reversible error, of which the appellant can complain to this court, in sustaining the demurrer to the amended complaint, there can be no merit in the third and fourth assignments. We therefore argue these three assignments together.

(1). *Appellant elected to stand on complaint.* The record in this case would indicate that the appellant stood upon its original complaint and not upon its amended complaint and that the court below dismissed the action with that understanding. The judgment of dismissal simply says: "The plaintiff having failed and refused to further amend its said complaint, it is by the court ordered, adjudged and decreed that this action be, and the same is hereby dismissed." (R. 34). But the

bill of exceptions specifically says that the plaintiff elected "to stand on its complaint." This allegation follows a specific reference to both the complaint and amended complaint, differentiating between the two by the use of the terms "complaint" and "amended complaint." (R. 37). The appellant here can maintain no claim of error based on the order sustaining the demurrer to the complaint, because any such claim was waived. (See our argument on the first assignment). On the other hand, it can maintain no claim of error on the order sustaining the demurrer to the amended complaint, because the appellant elected in the lower court to stand on the complaint. It is elementary that an election having once been made is binding. The rule is stated in 15 Cyc. 262 as follows:

"An election once made, with knowledge of the facts, between co-existing remedial rights which are inconsistent is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with that asserted by the election."

See also *Klipstein & Co. v. Grant*, 72 C. C. A. 511.

It may well be that the district court, and perhaps with the consent of the attorneys for the appellees, allowed such an election, particularly in

view of the fact that the two complaints state different causes of action and are inconsistent with each other.

(2). *The amended complaint changes the cause of action and is inconsistent.* The original complaint proceeded on the theory that Tiberg claimed title to a certain fund, which fund belonged to the appellant, but was not in the possession of either Tiberg or appellant, and that there was an implied contract with the appellant that the appellees were holding such fund for the appellant. The prayer of the first complaint was simply that the appellees be enjoined from claiming or holding the proceeds and that the appellant be decreed the owner thereof. The amended complaint proceeds upon an entirely different theory. There is in it no allegation that Tiberg claims title. The allegation simply is that Tiberg took and carried away gold dust, nuggets and amalgam of the value of \$15,000 and upwards, which he has converted to his own use; the proceeds thereof, by reason of the arrest of Tiberg on a criminal charge, has come into the custody of the appellee Sundback as clerk of the district court; that the appellant has a lien upon the proceeds in the hands of the clerk and the appellee Tiberg is liable to an accounting to the appellant. (See particularly Paragraph XII amended complaint, R. 29). The prayer in the amended complaint demands a money judgment against Tiberg in the sum of \$14,345.02; that the appellant be

adjudged to have a lien on the fund in the hands of the appellee, Sundback, as clerk; that said fund be declared to be a trust fund to which the appellant is entitled; that the appellees be restrained pending the hearing on the merits and thereafter forever enjoined. In other words, the primary thing sought in the first complaint is a decree of the court quieting title in the appellant as against the appellees of certain money in the hands of the appellee, Sundback. There is not in the prayer of the complaint even any specific request that the fund be delivered to the appellant. Neither is there in that complaint any demand for a money judgment against either of the appellees except for costs, and there is no claim for a lien or an accounting. The primary thing sought in the amended complaint, however, is a money judgment against the appellee Tiberg in the sum of \$14,345.02, together with a lien on the fund and what is in effect a foreclosure thereof, and that (manifestly with the foreclosure of the lien claimed) the title be decreed to be in the appellant as a *cestui que trust*. The prayer of the amended complaint does not contain any specific request for a delivery of the fund to the appellant, and the injunctive relief sought seems to be more incidental than is the case in the complaint. In fact, the amended complaint seems to abandon the theory on which the original complaint was drawn and it is even open to question that the appellant attempted to change from an equitable

to a legal action. It is manifest that the same evidence would not support both complaints. Therefore, there has been an attempt to change the cause of action. 1 Enc. Pl. & Pr. 566. This is not permissible either at common law or under the codes. 1 Enc. Pl. & Pr. 547 *et seq.* Neither is it permissible to change an equitable into a legal action or *e converso* by amendment. *Blalock v. Equitable Life Assur. Soc.*, 73 Fed. 655.

In any event, the amended complaint does not state a cause of action at law. The authorities are unanimous that property in *custodia legis* is not subject to legal process. As stated in 34 Cyc. 1367: "It is a well-settled doctrine of common law that replevin will not lie for goods in the custody of the law, any interference with the goods so held being considered an infringement of the prerogative of the court and a contempt thereof."

*Wilde v. Rawles*, 22 Pac. 897;

*Cooley v. Davis*, 34 Ia. 128;

*Karr v. Stahl*, 89 Pac. 669;

*Covell v. Heyman*, 111 U. S. 176.

(3). *The rule at law applies also in equity.* It is a maxim that "Equity follows the law." We are unable to find any authorities holding that property in *custodia legis* can be taken by a decree in, or process issued out of, a court of equity any



more than it can be by judgment or execution in a court of law. It is not apparent why any different rule should obtain. The rule at law is not due to any infirmity of the law, but is due to the fact that no interference with property in *custodia legis* is permitted. If property in *custodia legis* cannot be reached by a judgment based upon the verdict of a jury, it is difficult to perceive why the same property should be any more subject to a judgment based upon a decree of a court of equity. If a district judge sitting as a court of equity has the power to dispose of property in *custodia legis*, surely another district judge of coordinate jurisdiction would have the same power. Take a case in which a United States judicial district has in it more than one division. The judge of each division has coordinate jurisdiction throughout the entire district. Suppose that Tiberg had been tried and acquitted in Seattle, instead of at Nome. Then suppose that the district judge who sits regularly at Tacoma, but who has coordinate jurisdiction over the entire western district of Washington with the Seattle judge, should undertake to interfere with the possession of the clerk of the court at Seattle over this same fund held in the same way. Beyond any question, if the judge at Seattle has such power and jurisdiction, the judge at Tacoma would have the same power. Such a ruling would lead to an absurdity. On principle, the same rule applies in a court of equity

as in a court of law and property in *custodia legis* cannot be subjected to any possible judgment or decree except in the same case in which it was placed in the custody of the law.

(4). *No trust could arise.*

In *Perry on Trusts*, a work which has gone through six editions and is admittedly one of the best treatises on this subject, it is stated in Sec. 128, page 197 as follows: "If one who stands in no fiduciary relation to another, appropriates the other's money, and invests it in real estate or other property, no trust results to the owner of the money. There is no doubt of this principle upon all the cases."

In *Pascoag Bank v. Hunt*, 3 Edwards Chancery 583 and 6 New York Chancery Rep. 770, the complainants by a bill in equity charged their late cashier with the larceny of a bond and mortgage for \$23,000.00 which he had converted into money and invested in loans and securities which were in possession of the cashier. A temporary injunction was granted and the matter was heard on a motion to dissolve the injunction. The opinion in that case is particularly applicable here as it indicates that a verdict of not guilty in a criminal court on the same charge would end all possibility of equity interfering. The opinion by the Vice Chancellor reads:

“The bill calls on the court to investigate a charge of embezzlement amounting to the crime of felony; and then to follow the funds abstracted and lay hold of a bond and mortgage which it is supposed the money of the complainants or their own bank bills went towards purchasing and apply said bond and mortgage to their indemnity. In the first place, I believe the complainants must be left to pursue their cashier, Hunt, in a court of criminal jurisdiction. And in the second place, if he should be found guilty, I still do not see where this court gets its authority to indemnify the complainants for their loss out of property acquired by Hunt. The bill does not show that he made the loan or advance, on the security of the bond and mortgage, for the bank; but, on the contrary, that he did it for his own benefit, although he might have obtained some of the means from their funds. I think the bill does not make out such a case of implied or resulting trust as gives the court of chancery any jurisdiction. Ordered, that the injunction be dissolved, with costs.”

In *Doyle v. Murphy*, 22 Ill. 502, 74 Am. Dec. 165, there was a bill in chancery by Murphy and wife against the widow and heirs at law and administrator of Maurice Doyle. The bill alleged that the Murphys were the sole legatees and devisees of a Mrs. Catherine Byrne and that Mrs.

Byrne had delivered certain money to Maurice Doyle to pay certain debts, but that Doyle converted the money to his own use and that certain bonds were placed in an iron safe left with Doyle by Mrs. Byrne who locked it and kept the keys in her possession; but Doyle, by means of false keys, opened the safe, abstracted the bonds and placed in their stead forged bonds for a similar amount. The Master in Chancery found that the evidence substantiated the allegations of the bill. The Master's report was confirmed and a decree entered for the complainants. On appeal, this decree was reversed and the bill was ordered dismissed. The court said, *inter alia*:

“And the acquisition of property by either larceny or trespass, it is believed, has never been held to create the relation of trustee and *cestui que trust*. And this is what the charge in the bill, and the evidence in its support, if it were believed, amounts to, and nothing more. If such facts were held to create a trust, the court would have jurisdiction in every case of larceny and trespass *de bonis asportatis*.”

Cases can be found where courts have declared constructive trusts in property in the possession of a thief after the thief has been convicted of the larceny of that property in a criminal trial, but there is not in the books, so far as we have been



able to find, after an exhaustive search, a single case holding a man a constructive trustee of property which he is alleged to have stolen, but of which crime a jury has found him not guilty or of which he has not been convicted. We cannot even find a single case in which an equity court has held that it had jurisdiction under such circumstances. We challenge opposing counsel to produce a single authority in which any such rule is stated.

These attempts to impose constructive trusts have arisen probably more often in connection with banks than any other one institution. Morse in his work on Banks, first volume, Sec. 173, says:

“If the cashier embezzles funds of the bank, and invests them, a court of chancery has no power to fasten a trust upon the investment, and to declare the cashier to be a trustee holding that he has purchased in trust for the bank. The mere fact that the cashier obtained the means of purchasing by a theft from the corporate funds, providing that he actually made the purchase in his own name, and on his own account, does not create such a case of implied or resulting trust as to give jurisdiction to a court of equity for the sake of taking possession of the purchased property, and in order that indemnification may be made from it to the bank.”



(5). *Without title or possession there could be no trust.* The complaint in this case pleads affirmatively that Tiberg has not title, possession, or right of possession of this fund or any part of it. It also fails to contain any direct allegation that Tiberg is even claiming any title to, interest in, or lien on the fund. The purpose of the amendment in this particular was to avoid the ruling of the district judge that inasmuch as the complaint showed that Tiberg claimed title, he was entitled to a jury trial. On that issue, we assume that the appellant will argue here that the complaint does not show that Tiberg is claiming title to the fund. We believe that the complaint, taken as a whole, shows that he is claiming title; but for the purposes of this point, we will argue it on what must be the theory of the appellant.

Can a person be charged as trustee who, according to the bill in equity by which it is sought to establish such trust, has not the legal title, possession, or right of possession of and is not claiming any title to the property of which it is sought to have him declared a trustee? The question ought to answer itself. How can a man be held as a trustee of property of which, according to the bill, he has not and is not claiming either a legal or equitable title and has not possession or right of possession? Suppose an equity court should decree a man to be a trustee under such circumstances. What order would it make? Would it make an

order directing him to convey either the legal or equitable title to the *cestui*? He could not comply with such an order because, according to the bill, he has not either the legal or equitable title. Would it make an order quieting title in the plaintiff? That would be useless, because the complaint fails to show that the defendant is claiming title. Would it make an order directing the alleged trustee to deliver possession of the property? He could not because, according to the allegations of the bill, he has not possession. Would the court make an order directing an assignment of the right of possession? Under the allegations of the bill, he has no such right.

It will certainly be conceded that there could be no trust in this case unless it is a constructive trust and that Tiberg could not be a trustee unless he is a trustee *ex maleficio*. The rule is laid down in 39 Cyc. 169, that constructive trusts are trusts which arise by operation of law “whenever the circumstances under which property was acquired make it inequitable that it should be *retained by him who holds the legal title*.” This definition shows the necessity for legal title in the alleged trustee. We do not claim that there must necessarily be an actual legal title in personal property before a constructive trust may arise. In the case of real property, beyond a question, the record legal title must be in the alleged trustee or no constructive trust arises. Inasmuch, however, as the

possession of personal property is often proof of title, and the possession is in itself *prima facie* title to personal property, a constructive trust may arise as against the person who has not actual legal title, but who has the possession, that is, the *prima facie* legal title, of personal property. Many of the authorities lay down the rule that a constructive trust may arise as against the person who has the legal title. In considering these authorities, it must be understood that they treat the actual possession of personal property as legal title.

In *Walker v. Bruce*, 97 Pac. 250 (252), constructive trusts are defined as follows:

“Constructive trusts are such as are raised by equity in respect to property which has been acquired by fraud, or where, although acquired without fraud, it is against equity that it should be retained by him who holds the legal title. Washburn on Real Property, Sec. 1430.”

In *Borchert v. Borchert*, 113 N. W. 35 (37) the rule is stated: “An action lies to establish a constructive trust and to recover the subject thereof where the property wrongfully obtained in specie, or in its converted form, *still remains in the possession of the wrongdoer.*”

In *Christy v. Sill*, 95 Pa. St. 380, it is specifically laid down that a constructive trustee must have the manual possession of the property on which it is sought to impress a trust. The court

said: "He is not trustee for the title, for that he never acquired, but of the thing *which he has in manual possession.*"

In *Smith v. Des Moines National Bank*, 78 N. W. 238 (239), it is stated: "It is a general rule that anyone wrongfully *possessed of an estate* becomes a trustee *ex maleficio.*"

In *Moore v. Crump*, 37 So. 109 (110) the court states: "The complainants (appellees here), invoke the well-established and well-recognized doctrine that, where a grantee or devisee obtains the *possession and title* to land intended for another by actual fraud, on proof of the fraud, a trust will be raised in favor of the latter."

In *Fetter's Equity*, 198, the rule is stated: "When, on the grounds of justice and good conscience, without reference to the intention of the parties, equity considers *the holder of the legal estate* to be not entitled to enjoy the equitable or beneficial interest, it treats him as a trustee." To the same effect see 2 Pom. Eq. Jur. Sec. 1053.

In *People v. Houghtaling*, 7 Cal. 348 (352) the rule is stated:

"The defendant is wrongfully *in possession* of a specific fund, belonging to the plaintiff, Said fund constitutes no part of the estate of Wright, and defendant's appointment as administrator of Wright, conferred upon him no authority to take or retain it. He occupies the



position, *who takes possession* without authority of property belonging to another, and may be treated as a trustee *de son tort*. Hill on Trustees, page 173."

The case of *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152 is as favorable to complainant in this case as are any of the well-considered opinions, but it is laid down expressly there that equity can only impress the property with a constructive trust while it remains in the possession of the alleged thief or his assignee with notice, and that the action is against the person in possession. What right then, has the Pioneer Mining Co. to maintain this action against Tiberg? The bill in equity shows that Tiberg has not possession and they allege facts which, if true, would have prevented him from ever getting or transferring any legal title, because a thief can acquire no title to the property he steals or the proceeds thereof.

*Silbury v. McCoon*, 53 Am. Dec. 307;

*Bassett v. Spofford*, 6 Am. Rep. 101.

Perry, in his work on trusts, Vol. 1, p. 520, makes it plain that a man cannot be a trustee unless he has the legal title and the primary use. He says:

"From these instances, it will be seen that, in order to create a trust, it is necessary to prevent the legal estate from vesting in a



*cestui que trust*, and it is necessary that not only the *legal title*, but the *primary use*, should vest in the trustee.”

This author further makes it plain that a court of equity has no power to prevent a trustee from reducing a trust fund to possession. This court could only grant an injunction on the theory that Tiberg is a trustee, and we submit that it would be the first time that an equity court ever enjoined a trustee from taking possession of the trust estate. Mr. Perry says: “The trustee, being liable for a breach of trust, if he permits any misapplication of the funds, *should of course have the possession and control* of all personal property.” Vol 1, page 558.

(6). *An equity court is asked to review an adjudicated charge of crime.* The complaint affirmatively alleges that the money came into the possession of the clerk of the court in connection with a charge of crime and that this charge has been adjudicated. The equity court is then, in effect asked to review and revise the adjudication in the criminal case and to direct what the law court shall do in the criminal case with certain evidence therein. There is no case in the books where any court has ever assumed to possess any such power or jurisdiction. There are cases in which the pleading affirmatively showed that the defendant in a criminal case had been convicted and in which the court gave the adjudication in the criminal case

its full weight and disposed of the property of which the defendant in the criminal case had been found guilty of stealing. The basis of this power has been expressly placed by some of the courts on the theory that the defendant could not complain because he has been convicted in a criminal action. In other words, while the criminal action is not, of course, in a strict sense, an adjudication, another court called upon to pass upon the title or right of possession of the property of which the defendant in the criminal case was found guilty of stealing, treats the adjudication in the criminal case as in effect, binding in a suit in which both the parties and issues are different.

In any event, as the district judge in this case states in his opinion, the presumption of innocence obtains. All of the authorities hold that in a civil action over the same property of which the defendant was convicted of stealing in the criminal case, the presumption of innocence obtains. Some of them deny that the crime must be proved in the civil case beyond a reasonable doubt, but they then proceed to state the rule in words that mean the same thing. See

*2 Greenleaf Evidence*, Sec. 408;

*Thurtell v. Beaumont*, 1 Bing. 339, 8 Eng.

Com. Law Rep. 531;

*Taylor's Evidence* 97;

*Bishop on Marriage & Divorce*, Sec. 644;  
*Thayer v. Boyle*, 30 Me. 475;  
*Butman v. Hobbs*, 35 Me. 228;  
*McConnell v. Mutual Insurance Co.*, 18 Ill.  
229;  
*Pryce v. Security Insurance Co.*, 29 Wis. 270;  
*Freeman v. Freeman*, 31 Wis. 235;  
*White v. Comstock*, 6 Vt. 405;  
*Brooks v. Morse*, 10 Vt. 37;  
*Ricker v. Hooper*, 35 Vt. 457.

(7). *The bill shows no equity.*

(a). It is elementary, of course, that the complaint must show that the plaintiff has not an adequate remedy at law. *The complaint in this case does not show that Tiberg has not been convicted.* If he has been convicted of stealing the described property, then the plaintiff has an adequate remedy under Sec. 2375 Comp. L. of Alaska, by means of a summary proceeding in the criminal case in connection with which the fund in question came into the custody of the law.

(b). The complaint contains no allegation that there is either probability or possibility of this money being delivered to Tiberg irrespective of any relief the appellant may or may not get in the pending case. There is no allegation that the clerk

is about to pay or will deliver this fund to Tiberg or that the court is about to or will make any order for its delivery. The fund being in *custodia legis* can only be returned by the clerk on the order of the court, which order must be made in the case in which jurisdiction over the fund was obtained. The only allegation in the amended complaint as to any facts showing the possibility of damage is "that the defendant Tiberg has demanded, by oral motion addressed to said court, the return to him of said deposit in the hands of his said co-defendant, and threatens to demand and claim the same, and unless restrained from so doing, he will demand and claim said deposit, and the said proceeds of said gold dust, nuggets and amalgam from his said co-defendant, Sundback, and of this court." There is not even any allegation as to what the court did on Tiberg's oral motion. The complaint must show equity. Perhaps the court denied that oral motion. Mere apprehension or possibility of wrong and injury by defendant is not enough to warrant an injunction. The complaint must show at least a reasonable probability of wrongful action and irreparable injury before an equity court will interfere. *Hurd v. Atchison T. & S. F. Ry. Co.*, 84 Pac. 553. It is too elementary to need the citation of further authorities that equity courts will not take jurisdiction of actions which merely seek to prevent a person from making demands for the possession of personal property, there being nothing in the

complaint to show even a possibility that the demand would be complied with by any person.

(e). The sole ground of equitable jurisdiction claimed in the complaint is insolvency of Tiberg. In the first place, if the fund in question was delivered to Tiberg, it is very apparent that he would be able to respond in damages and could be compelled to pay a judgment at law to the extent of \$14,345.02. In other words, the facts pleaded in the complaint negative the conclusion of insolvency. Moreover, an equity court will not take jurisdiction merely because of insolvency and a bill in equity that states no other ground for equitable interference is demurrable. If insolvency be admitted, the rule is that that alone does not make the remedy at law inadequate. If it did, then every man who had a suit against a defendant, where the defendant is unable at the time to pay the judgment rendered, could bring his suit in equity and deprive the defendant of a jury trial. This is obviously not the law.

*Pensacola etc. Co. v. Spratt*, 91 Am. Dec. 747;  
12 Fla. 26;

*Heilman v. Union Canal Co.*, 37 Pa. St.  
100;

*Mechanics Foundry v. Ryall*, 17 Pac. 703;

*Centerville etc. Co. v. Barnett*, 2 Ind. 536;

*Moore v. Halliday*, 72 Pac. 801;



*Dills v. Doeblor*, 26 Atl. 398; 36 Am. St. Rep.  
345; 20 L. R. A. 432;

*Brown v. Birmingham*, 37 So. 173;

*Reyes v. Middleton*, 17 So. 937; 51 Am. St.  
17, 29 L. R. A. 66.

The language of the *Mechanics Foundry* case is very apt. That was an action to restrain a trespass and there was an allegation both of irreparable injury and of insolvency. The court said: "Nor will equity interpose to restrain a trespasser simply because he is a trespasser and is insolvent." The plaintiff in this case could not possibly recover without proving a trespass.

In the *Dills case*, an action was brought to restrain a person from resuming the practice of dentistry in a certain city without the payment of a sum fixed upon by contract between him and a former associate. The bill set up the contract, its breach, and the insolvency of the defendant and alleged that the plaintiff had no plain, speedy and adequate remedy at law. The lower court granted an injunction. This was reversed by the Connecticut Supreme Court on appeal. The court said:

"The brief of the plaintiff's counsel suggests that the defendant is insolvent, and that the plaintiff could not collect the damages if he should obtain a judgment therefor. There is no finding to that effect; and if it were so,

that fact could not give to a court of equity, the right to issue an injunction. It is the contract itself which gives to or takes away from the court its jurisdiction, not the wealth or poverty of a party defendant. *Nessle v. Reese*, 19 Abb. Pr. 240, 29 How. Pr. 382."

Therefore, in the case at bar, it must be the allegation that the defendant Tiberg wrongfully took this gold dust which gives to or takes away from this equity court its jurisdiction. That jurisdiction cannot be aided by a mere allegation of insolvency and, under all the authorities, the allegation as to the taking of the property and of the title thereto, is a question of law to be determined by a jury.

The rule is: "Where the main object of suit is to settle title, an injunction to restrain a trespass will not be granted merely because of the insolvency of the defendant."

22 Cyc. 839;

*Strang v. Richmond*, 93 Fed. 71;

*Godwin v. Phifer*, 41 So. 597;

*Morgan v. Palmer*, 48 N. H. 336;

*Pensacola etc. Co. v. Spratt*, 91 Am. Dec. 747:

In this last case, part of the syllabus reads: "Insolvency of defendant is not of itself sufficient to

authorize granting of injunction. There must exist some other equitable grounds for the interposition of the court."

In the *Strang* case, the court said:

"Complainant comes into this forum because of alleged inadequacy of relief at law. This, in a large measure, depends upon the character of the relief to which he is entitled, unless it be that upon the mere allegation of insolvency he is entitled to redress in a court of equity. This is not my understanding of the law. Something more than an apprehension that a judgment, if obtained, will not prove availing, on account of insolvency, is necessary to justify a court of equity in reaching forth its hand to give relief. Serious consequences may result by this action on the part of the court. The right of trial by jury is denied the parties, and courts of equity should only intervene where the remedy at law is plainly inadequate; that is to say, where, by the ordinary legal procedure, the merits of the controversy, according to right and justice, cannot be gotten at, and relief afforded. 1 Story, Eq. Jur. Sec. 33, and note; *Hyer v. Traction Co.*, 168 U. S. 471, 480, 18 Sup. Ct. 114; *Fallon v. R. R. Co.*, 1 Dill. 125, 126, Fed. Cas. No. 4629."

In the *Godwin* case the court said:

"The insolvency of the debtor is never a sufficient reason of itself for the exercise of the

extraordinary power of the court by way of injunction. There must be some other equitable ground combined with insolvency.”

What other equitable ground is there in this case?

The case turns on the question of title which is purely a question of law. The claim that Tiberg is trustee is purely a pleading of a legal conclusion which also turns on the question of title involved. There is no equitable ground except insolvency.

(c). The appellant has an adequate remedy at law. It can bring an action at law in connection with which defendant Tiberg will be entitled to a jury trial. In an ancillary proceeding, after the commencement of such an action at law, if the facts warrant, it could get either an injunction in aid of the law action, or an order that the money be paid into the registry of the court to abide by the outcome of the action, or all of the interested parties might be compelled to interplead. The clerk cannot be compelled to deliver the money until after an order of the court made in the case of *U. S. v. Tiberg*. These are clearly remedies which are plain, speedy and adequate. That the appellant in this case has an adequate remedy at law, see, *The Sultan v. Providence Tool Co.*, 23 Fed. 572; *Dumont v. Frye*, 12 Fed. 21; *Edelman v. Latshaw*, 28 Atl. 475; *Buzard v. Houston*, 119 U. S. 347, 30 L. Ed. 451; *Sawyer v. Atchison etc. Co.*, 129 Fed. 100; *Fletcher v. Root*, 88 N. E. 987; *Lawrence v.*

*Times Printing Co.*, 90 Fed. 24; *Paine v. Doughty*, 96 N. E. 212; *Deepwater Ry. Co. v. Motter*, 116 Am. St. Rep. 873, 53 S. E. 705.

In the *Lawrence case*, 90 Fed. 24, an attempt was made to have the Times Printing Co. declared a trustee *ex maleficio* of certain property, but the court held that inasmuch as the property in question was capable of manual possession they could recover in an action at law. The court said:

“They say that the complainant asserts ownership and legal title to the franchises in question, but that, through the fraud of the respondent the Times Printing Company, the possession and enjoyment of his property rights in this and other valuable things, such as the good will, name, etc., of said newspaper, are unlawfully withheld from him; that the conduct of the Times Printing Company in the particulars alleged in effect places that company legally in the attitude of a trustee *ex maleficio*, or a transferee under a fraudulent conveyance holding the property for the real owner. Their argument rests upon the proposition that the franchise, the good will, the name, and the circulation of the newspaper are specific articles of property, capable of being transferred and reduced to possession by the acts of the parties, and that said property has a legal situs within this district, and is therefore within the jurisdiction of this court, so that the



court may, by its decree, enjoin the *mala fide* holder from using the same, and also protect the rightful owner in the exclusive use and enjoyment thereof. \* \* \*.

As to the books containing accounts and names of subscribers and patrons of the newspaper, they are articles of which manual possession may be taken, and which may therefore be recovered in an action at law. Therefore a court of equity is without jurisdiction to assist the complainant in recovering possession of said property."

(8). *The title to this fund is involved and cannot be tried in this action.* No doubt the appellant will claim that the amended complaint does not show that Tiberg claims title to this property. We think, however, that the amended complaint, taken as a whole, and particularly Paragraphs V and XI, show that Tiberg claims title. In fact, the appellant pleads a title in him derived by conversion. The rule is elementary that an equity court will not interfere to protect a claimed right in property until the complainant has established his title by an action at law. In 22 Cyc. 818, the rule is stated:

"As a general rule, a court of equity will not interfere to protect legal rights in property until the complainant has established his title or right by an action at law, especially where

the answer denies the title of the complainant to the property sought to be protected.”

In 22 Cyc. page 821, the rule is laid down: “Likewise equity will not try title to personal property in an injunction suit.”

In *Kistler v. Weaver*, 47 S. E. 478 (479), the rule is stated:

“An injunction will not issue when the title to personal property is the sole question involved. The question of title cannot be tried in that way. *Baxter v. Baxter*, 77 N. C. 118.”

See also:

*Young v. Young*, 9 B. Mon. (Ky.) 66;

*Power v. Alger*, 13 Abb. Pr. 284;

*Cumberland etc. Co. v. Allen*, 6 Ky. Law Rep. 741.

In *Tacoma Railway & Power Co. v. Pacific Traction Co.*, 155 Fed. 259, it was held that complainant had no standing in a court of equity to obtain an injunction because the object was to obtain an injunction to protect a disputed legal right and that a showing that defendant claimed title adversely to the complainant, put the complainant out of court. That decision is based on *Erhardt v. Boaro*, 113 U. S. 537, 28 L. Ed. 1116, in which the Supreme Court of the United States held that where an equitable suit was merely ancillary to an action at law to establish the title, the equity court, in

the ancillary proceeding for the purpose of preventing irremediable mischief, could preserve the property from destruction pending the legal proceedings. The court there makes it plain that an equity court has no power to try title and that an issue raised as to title puts the complainant out of court unless the action is merely ancillary to a suit at law. In other words, the equity court does not try title and does not permit complainants by subterfuges to prevent defendants from having questions of title tried to a jury. In *Lanier v. Alison*, 31 Fed 100, it was specifically held that complainant must proceed at law for the assertion of her title. See also: *Simmons v. Day*, 114 N. W. 853; *Hamilton v. Brent Lbr. Co.*, 28 So. 698; *Vaughn v. Yawn*, 29 S. E. 759; *Toledo etc. Co. v. St. Louis etc. Co.*, 70 N. E. 715; *Munyon v. Filmore*, 76 S. W. 257; *Stone v. Snell*, 94 N. W. 525; *North Shore R. Co. v. Pennsylvania Co.*, 44 Atl. 1083; *Watson v. Farrel*, 12 S. E. 724; *Lownsdale v. Grays Harbor Boom Co.*, 117 Fed. 983; *Todd v. Statts*, 46 Atl. 645; *Hume v. Burns*, 90 Pac. 1009; *Allott v. American Strawboard Co.*, 86 N. E. 685; *Eastern Oregon Land Co. v. Willow etc. Co.*, 187 Fed. 466; *Imperial Realty Co. v. West Jersey etc. Co.*, 81 Atl. 837; *St. Louis etc. Co. v. Wervess*, 23 Fed. 691. In *Cumberland etc. Co. v. Allen*, 6 Ky. Law Rep. 741, it was held:

“Equity will not interpose by injunction to enable parties to try title to personal property; the remedy at law being sufficient for that purpose.”

In *Young v. Young*, 9 B. Mon. (Ky.) 66, an injunction was brought to prevent the transfer of two slaves. Plaintiff claimed to own the slaves and alleged that the defendant was in possession of them and was about to sell them to the irreparable damage of the plaintiff. Defendant denied the title of the plaintiff and the court held that the issue as to title put the plaintiff out of court.

(9). *Sundback could not be held as trustee and therefore there is an improper joinder of parties defendant.* The appellee, Sundback, does not claim to hold under Tiberg. It is elementary that if A is a trustee of certain property and B takes under A with knowledge of the trust, B becomes a trustee, but B must take by virtue of a voluntary conveyance on the part of A before the mantle of the trust will fall on B's shoulders. In this case, Sundback does not hold under Tiberg because Tiberg was dispossessed by superior force and Sundback claims under and by virtue of that superior force and his official position.

(10) *Equity cannot operate to prevent a trustee taking possession of trust funds.* The amended complaint seeks to charge Tiberg as a trustee and

then to prevent him as trustee from taking possession of the funds. We challenge opposing counsel to cite a single authority sustaining such a position. It is laid down by Perry in his work on Trusts, Vol. 1, page 704, as follows:

“The first duty of the trustee, after his appointment and qualification to act, is to secure the possession of the trust property.”

The complaint alleges that Tiberg is a trustee and then asks the court to enjoin the alleged trustee from doing what the authorities say is his first duty. These positions are clearly inconsistent.

(11). *The money cannot be identified.* The complaint alleges that Tiberg took gold dust, etc., retorted it and delivered the amalgam so retorted to the assay office and received a certificate therefor; that thereafter this certificate was cashed and Tiberg received for it \$5345.02 in cash and a negotiable draft, and that this draft had been since cashed by the appellee Sundback. It was held in *Union National Bank of Chicago v. Goetz*, 138 Ill. 127, 32 Am. St. Rep. 119, that the right to pursue as a trust fund property which has been wrongfully converted into other property, fails when the means of ascertaining its identity is lost, and that *as a matter of law such means of ascertaining its identity is always lost when the subject matter is turned into money or becomes confounded in a general mass of property of the same description.*



Justice Story, in his work on Equity Jurisprudence, Vol. 2, Sec. 1258, says that the right to follow the property converted "ceases when the means of ascertainment fails, which, of course, is the case when the subject matter is turned into money, and mixed and confounded in a general mass of property of the same description." What else has happened in this case? In the case of *School Trustees v. Kirwin*, 25 Ill. 62, the court held that an action of this kind could be maintained only against a person *in possession* of trust property and that the funds in that case having been deposited in the bank, its identity as a fund was lost and the court of equity was powerless. The court said:

"When it was received into the bank, the money was mixed up with the money of the bank, and its identity as a fund thereby lost. It never appeared on the books of the bank as a part of the school fund or school money.  
\* \* \* The means of ascertaining the identity of this fund having failed, by the money having been mixed and confounded in a general mass of property of the bank of the same description, the right to pursue it must also fail."

In the case of *Thompson's Appeal*, 22 Pa. St. 16, the Supreme Court of Pennsylvania said:

"The right of pursuing it (alleged trust fund) fails when the means of ascertainment fails. This is always the case when the sub-

ject matter is turned into money, and mixed and confounded in a general mass of property of the same description.”

To the same effect see: *Goodell v. Buck*, 67 Me. 514; *Portland etc. Co. v. Locks*, 73 Me. 370; *U. S. v. Inhabitants of Waterborough*, 2 Ware 158; *Englar v. Offutt*, 70 Md. 78, 14 Am. St. Rep. 332; *Johnson v. Ames*, 11 Pick. 173.

With respect to the identity of this fund, Perry on Trusts, Vol. 1, p. 1358, says:

“But if the identity of the fund is lost, as by mixture with private funds, and the whole deposited to a private account, the *cestui* will stand on no better footing than other creditors of the trustee.”

Lord King in *Deg v. Deg*, 2 P. Wms. 414, long ago remarked that:

“Money has no earmark, in so much that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realize all his testator’s estate and afterwards die insolvent, a court of equity could not charge or follow the land.”

The same thing has been held as to bank notes and negotiable bills. *Cox v. Bateman*, 2 Ves. 19; *Whitcomb v. Jacobs*, 1 Salk. 160; *White v. Whorwood*, 2 Atk. 159.

(12). *The property having been taken from Ti-berg’s person in connection with his arrest on a*

*criminal charge, it cannot be subjected to any process either legal or equitable until it has first been returned to Tiberg, or until he has been convicted of stealing that identical property.* The fourth amendment to the Constitution of the United States guarantees to the people security for their persons, houses, papers and effects against unreasonable searches and seizures. The fifth amendment contains an inhibition against taking property without due process of law. Our laws do not permit the forfeiture of property rights by reason of a conviction for a crime, and certainly not when the criminal case has merely been "adjudicated." The possession of personal property is *prima facie* proof of title and both title to and possession of personal property are property rights which are protected by the fifth amendment and of which a person cannot be deprived without due process of law. The seizure and search incidental to the arrest of a person on a criminal charge, are certainly not due process of law, insofar as the title to and right of possession of the property removed from his person is concerned. Amendments four and five are limitations upon the territories and their courts. *Ty. v. Cutinola*, 4 N. M. 160.

Tiberg was deprived of his possession in connection with a criminal charge. That criminal charge being "adjudicated," the money must first be returned to him from whom it was taken before it can be reached by any process.

*Welch v. Gleason*, 5 S. E. 599;  
*Holkner v. Hennessey*, 42 S. W. 1090, 39 L.  
 R. A. 165;  
*Sturtevant v. Bohn*, 78 N. W. 265;  
*Hill v. Hatch*, 63 Am. St. 82, 41 S. W. 349;  
*Dale v. Brumbly*, 64 L. R. A. 112;  
*Baker v. Peterson*, 77 N. W. 774;  
*Allen v. Gerard*, 44 Atl. 592, 79 Am. St. Rep.  
 816;  
*U. S. v. Parker*, 166 Fed. 137;  
*Cowart v. Caldwell*, 68 S. E. 500;  
*Priestly v. Hilliard*, 187 Fed. 784;  
*Morris v. Penniman*, 74 Am. Dec. 675;  
*Robinson v. Howard*, 7 Cush. 257, 61 Mass.  
 257;  
*Commercial Exchange Bank v. McLeod*, 65  
 Iowa 665, 54 Am. Rep. 36;  
*Richardson v. Anderson*, 18 S. W. 195.

The Massachusetts case of *Robinson v. Howard*,  
*supra*, is squarely in point. In that case, the plain-  
 tiff tried to impress a trust upon property in the  
 hands of an officer, which property the officer had  
 taken off of an arrested person by virtue of a crimi-  
 nai warrant. In that case, as in this one, the arrest-

ed person and the officer were made defendants and the defendant in the criminal charge had been acquitted. The claim made in the bill was that the officer was a trustee. The alleged trustee made a showing that he took the articles as officer at the time he arrested his co-defendant for larceny and that the co-defendant had been discharged from the criminal charge. The court said:

“The court are of opinion, that the judgment of the court of common pleas ought to be affirmed, and the trustee discharged. The trustee was an officer charged with the service of criminal process, issued on the complaint of this plaintiff. He acted by color of his office, and, as incidental to the service of the process, took from the trustee the money and property in question, declaring it to be in performance of his official duty, which was to carry the defendant before the examining magistrate. \* \* \* The property was taken by him as a public officer, performing an official duty. We should fear that any other construction would lead to a gross abuse of criminal process. Such process might be used to search the person, or otherwise, under color of lawful authority, to get possession of the property of a debtor, in order to place it in the hands of the officer, and thus would make it attachable by trustee process.” The case was dismissed.



The same thing has been tried in several other cases in an attempt to get around the rule that money in the hands of an officer cannot be garnisheed. The courts have uniformly held that property in the hands of an officer can no more be impressed with a trust than it can be garnisheed.

The courts uniformly hold that if the officer in question is not holding officially, his possession is the possession of the defendant in a criminal case and that his possession being wrongful, no advantage whatever can be taken of it. If, however, the possession of the officer is rightful, the rule is as stated in the *Cowart case*, 68 S. E. 500:

“The general rule is that while property or money is in *custodia legis*, the officer holding it is a mere hand of the court; his possession is possession of the court; to interfere with his possession is to invade the jurisdiction of the court itself; and an officer so situated is bound by the orders and judgments of the court whose mere agent he is and he can make no disposition of such money or property without the consent of his own court, express or implied.”

In the case of *Holker v. Hennessey*, 42 S. W. 1090, the court said:

“An officer is not liable by the trustee process to a creditor of a person arrested by him on a criminal warrant for money or other

property taken by the officer under color of official duty from the person of his prisoner and for which he gives the latter a receipt."

Quoting from *Morris v. Renniman*, 14 Gray, 220:

"Such process might be used to search the person or otherwise under color of lawful authority to get possession of the property of the debtor in order to place it in the hands of the officer and thus make it attachable."

Where is there any difference in the present case, when property taken in the same manner is sought to be tied up by injunction until it is disposed of by a judgment in a civil action? The same court in the *Renniman case*, *supra*, cited in the *Hennessey case*, goes on to say:

"No such abuse of criminal process should be allowed. The people should be secure in their persons, papers, homes and effects and from unreasonable searches and seizures."

In the *Hennessey case* above cited, the court further says:

"The rule of general application is that money or property which has come into the hands of an officer of the court by virtue of legal process, is regarded as in the custody of the law and cannot be taken from him under other process, either of execution, attachment or garnishment. \* \* \* The officer in such

case is the mere agent of the court and custodian of the property and to permit an interference with his possession would be to interfere with the jurisdiction of the court, and divert the property from the purposes for which it is held. No one could reasonably claim that money or other property taken from the person of a prisoner and held to be used as evidence of a criminal charge, could be taken out of his possession by other legal process *whether of the same court or another at least until final judgment of conviction.*”

Is not the language last quoted absolutely decisive of this question?

In the case of *Dahms v. Sears*, 11 Pac. 891, the court says:

“The security of the public may justify the searching of a prisoner confined in prison upon criminal or even civil process and taking from him of any property in his possession that would aid him to make an escape \* \* \* but to allow private parties to take advantage of the circumstances in order that they may secure a personal benefit would be a violation of that faith which the commonwealth owes to persons held in custody under its authority and laws. It would lead to oppression and abuse. The object and purpose of an arrest under civil and criminal process would be perverted

and schemes and devices be resorted to by importunate creditors to enforce a payment of their demands that would outrage justice and the right to personal security.”

We respectfully ask why the same reasons do not apply to the present case where the property is sought to be reached by a civil process?

The case of *State v. Williams*, 16 N. W. 586, is squarely on all fours with the case at bar and decisive of the question involved. In this *Williams case*, the defendant was accused of stealing money which was taken from him by search warrant and the money deposited in the hands of the Clerk of the Court. Quoting from the opinion:

“After the acquittal upon the indictment the defendant filed a motion for an order for the return of the money to her which motion the court overruled. The court against the objections of the defendant, ordered a jury to be called to try the title to the money. The defendant filed a motion to dismiss the case which motion was overruled. A trial to a jury was then had and resulted as above set forth. (The jury found the money in question to be the property of the prosecuting witness). If the defendant had been convicted of stealing the money in question, the duty of the District Court would have been clear. Sec. 4657 of the Code provides that ‘if the property stolen or

embezzled has not been delivered to the owner, the court before which the conviction was had may, on proof of his title, order its restoration.' In such case the conviction would be sufficient evidence that the money did not belong to the defendant. The only question for the court would be as to whether it belonged to the person from whom it was alleged to have been stolen. The court, we presume, might properly enough proceed to determine such question in a summary way. No third person would be affected by the finding. But we have a case where the defendant was acquitted. We must presume then that the money was not stolen. For such a case the statute seems to make no provision. It was probably not deemed necessary to make any provision. The money having been forcibly taken under a search warrant from a person presumptively innocent, it would seem to follow as a matter of course that the person holding the money in custody should deliver it to the person from whom it had been thus taken. We do not say that the judgment of acquittal was conclusive evidence of title in the defendant, all that we hold is *that this action having been determined in the defendant's favor, she was entitled to go out of court and be placed in the same situation in which she was before the money was taken, leaving Miller,*



*or any other person who may claim the money, to pursue his remedy by action in his own name."* Case reversed.

The case in effect holds that it is not, under such circumstances, for the court, in disposing of a motion for the return to the defendant of alleged stolen goods, to hear any evidence as to title either by calling a jury or without a jury. The point decided is that the *status quo* must be restored before the property can be reached by civil process. There is no real distinction between the Iowa Statute and the Alaska statute on the same subject. Sec. 2375 Comp. L. of Alaska reads:

"That if property stolen or embezzled has not been delivered to the owner the court before which the trial is had for the stealing or embezzling may on like proof and condition, order its delivery to the owner or his agent."

The Iowa statute uses the words "before which the conviction is had," while the Alaska statute uses the words "before which the trial is had"; but the language used, "that if property stolen or embezzled," certainly presupposes a conviction, otherwise it would not be described after trial and acquittal as property stolen or embezzled; and for the further reason that if a conviction is not presupposed in said section, then the effect of the section would be to give the court the power to decide title to personal property in a summary way

where there had been no adjudication of either ownership or lack of ownership in any person. This is absurd. It follows then, that Sec. 2375 is to all intents and purposes equivalent to Sec. 4657 of the Iowa Code. Any other rule would be in direct violation of principles laid down by all of the authorities in cases where like advantage is sought to be taken of persons by depriving them of property on their persons by means of criminal process and then subjecting such property to civil process which could not reach the property while on the person of the defendant. The possession of the court, where money is taken from a person at the time of his arrest on a criminal charge, is wrongful (and therefore no advantage of that possession can be taken) if the person arrested is not guilty, and should be deemed the possession of the defendant for all purposes except those of the criminal case itself and the property should be as inviolate from seizure or disposal by or on any form of civil process as if it were in the personal possession of the defendant.

#### FIFTH AND SIXTH ASSIGNMENTS.

These relate to the denial of the injunction *pendente lite*. There are two insuperable reasons why there can be no review on the merits of these assignments. *First*, no exception was taken in the lower court. (R. 35). Sec. 1055 Comp. L. of Alaska provides:

“No exception need be taken or allowed to any decision *upon a matter of law* when the same is entered in the journal or made wholly upon matters in writing and on file in the court.”

A ruling on the order to show cause why an injunction *pendente lite* should not be granted was not “upon a matter of law.” That order was a discretionary order in the lower court and the court was thereby called upon to exercise his discretion under all of the facts and circumstances. The record (pages 10 and 35) shows that the lower court made the order on evidence then introduced. In other words, the ruling was a ruling on a question of fact or at least a mixed question of law and fact. It was therefore necessary to take an exception. It is too elementary to need a citation of authorities that where it is necessary to take an exception the appellate court will not review the ruling of the trial court where no exception was as a matter of fact taken.

*Second*, the evidence on which the district judge acted is not here. This court, as we have heretofore shown in our argument on the motions, has not before you the evidence on which the district judge acted and therefore cannot review the order.

In any event, the order made was purely discretionary. In *Southern Pacific Co. v. Earl*, 27 C. C. A. 185, this court, speaking of a similar assignment of error said:

“The decision of the judge who made the order will not be reversed unless it appears, after a consideration of all the evidence upon which his action was based, that his legal discretion to grant or withhold the order was improvidently exercised.”

This decision is cited with approval in *Rahley v. Columbia Phonograph Co.*, 58 C. C. A. 639. How, under the state of the record here, could this court consider “all the evidence” upon which Judge Murane based his action? In *Vogel v. Warsing*, 77 C. C. A. 199, this court, speaking through Judge Gilbert, said:

“The granting or withholding of an injunction *pendente lite* ordinarily rests in the sound discretion of the court to which the application is made. It is not for this court to say whether it would have granted or withheld an injunction upon the showing which was made in the court below. We must recognize that upon that court was imposed the responsibility of the exercise of sound discretion upon the case as it was presented. Unless there has been a plain disregard of the facts or of the settled principles of equity applicable thereto, the exercise of the discretion of that court is not subject to reversal in this.”

The only question before the appellate court in such a case is, as stated in *Fireball etc. Co. v. Commercial etc. Co.*, 117 C. C. A. 354: "Does the proof clearly establish an abuse of that discretion by the court below?" The proof not being here, this court certainly cannot say that there was any abuse of discretion. No one can contend that in *every* case in equity brought for the purpose of obtaining an injunction, it is an abuse of discretion for the trial court to refuse an injunction *pendente lite*. See also

*Mitchell v. Colorado F. & I. Co.*, 117 Fed. 723;

*Allen v. Pedro*, 68 Pac. 99;

*Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381;

*Love v. Atchison etc. Co.*, 107 C. C. A. 403;

*Henry Gas Co. v. U. S.*, 111 C. C. A. 612;

*Kankakee v. American Water Supply Co.*, 118 C. C. A. 195.

#### SEVENTH ASSIGNMENT.

This is the claim that the court erred in discharging the restraining order. In the first place, as we have heretofore shown, the restraining order



died a natural death on October 29, 1912. In the second place, the defendants were entitled as a matter of right to a dissolution of the restraining order when the court refused an injunction *pendente lite*. That the lower court should be affirmed is respectfully submitted.

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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PIONEER MINING CO.,

Appellant,

vs.

JOHAN TIBERG and JOHN

SUNDBACK, as Clerk,

Appellees.

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No. 2338.

Appellant's brief having been received subsequent to the printing of this appellee's brief, we make our answer thereto in this supplemental brief.

In the opening words of appellant's brief "This is an action in equity", and in the subsequent argument, particularly on page 9, the appellant char-

acterizes its own action, and, in effect, admits, as it did in the lower court, that the complaint does not state a cause of action at law. In other words, the lower court must be sustained unless the complaint is sufficient as a bill in equity.

The statement on page 3, "all other errors must stand or fall upon what this court holds relative thereto", referring to the ruling on the demurrer, is only one-half correct. Undoubtedly all other assignments of error fall if the court sustains the ruling of the lower court on the demurrer, but it does not follow that the other assignments of error, or any of them, ought to be upheld even though the court should reverse the lower court on the demurrer. For instance, it does not follow that because a complaint is good against demurrer, it is reversible error to refuse to grant an injunction *pendente lite*.

The allegation on page 4 "that Tyberg is insolvent and not an inhabitant of Alaska", indicates another reason why such complaints ought not to be favored. The complaint shows that Tyberg was arrested in the State of Washington and was forcibly taken to Alaska to stand trial on a criminal charge and that he is not an inhabitant of Alaska. Nevertheless, while he was in Alaska to answer this criminal charge, and before he had an opportunity to leave that jurisdiction, this suit

was commenced against him. This suit was brought, as the allegations of the bill show, under Sec. 1316 Comp. L. of Alaska. The applicable part reads:

“No natural person is subject to the jurisdiction of the District Court of a district unless he appear in the court, or be found within the district, or be a resident thereof, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached.”

While it is true that Tiberg was then in the district, he was only there by virtue of superior force. The record of this court in the case of *Tiberg v. Warren*, 112 C. C. A. 596, shows how Tiberg came to be in Alaska. No advantage could have been taken of his presence under such circumstances for the purpose of making service of process upon him except for the fact that he had property within the jurisdiction. See *Holker v. Hennessey*, 39 L. R. A. 165 (167). Except for the property qualification of Sec. 1316 Comp. L. of Alaska, Tiberg could have objected to the jurisdiction of the court. *Greeley v. Lowe*, 155 U. S. 58, 39 L. ed. 69. However, by bringing the action under Sec. 1316, the plaintiff admitted that the property, by virtue of which the jurisdiction attached, was the property of Tiberg, or else the apparent jurisdiction was acquired by fraud. The appellant here is under the necessity of alleging in one breath that this property in ques-



tion was the property of Tiberg for jurisdictional purposes, but is not his property for all purposes in the case after jurisdiction attached. Having by this action admitted title in Tiberg, they ought not now be heard to deny it.

The allegation on page 4 that the only interest the clerk has, is to hold the fund for the benefit of the true owner subject to the orders of the court, is simply an incorrect legal conclusion. The clerk's duties in the matter arise from his official position. The fact as to how the money got into his possession is pleaded in the complaint. Legal conclusions are not admitted by demurrer.

*Fogg v. Blair*, 139 U. S. 118, 127; 35 L. ed. 104.

*Kent v. Lake etc. Co.*, 144 U. S. 75; 36 L. ed. 352, 358.

The statement on page 5 that the complaint alleges that a lien should be declared on the proceeds is not accurate. The allegation of the complaint is that a lien has attached. (R. 29).

On page 6 the appellant attempted to state in one paragraph the allegations of the complaint which, in its opinion, is sufficient to state a cause of action in equity. In that paragraph, it recognized the necessity for a showing that the clerk would turn over this fund to Tiberg unless restrained, for it there says that the complaint alleges: "that

if the court did not restrain him (Tiberg) from receiving and the clerk from giving the property on deposit with him to Tiberg, Tiberg would regain possession of the property on deposit with the clerk of the court." There is no such allegation in the amended complaint. The only thing that approaches it is in paragraph XI (R. 28), in which nothing is pleaded except that Tiberg "will demand and claim said deposit" from Sundback and of the court unless restrained from so doing. The word "demand" certainly does not contain any implication of compliance by the clerk of the court. The word "claim" is defined as "a demand of anything that is in the possession of another." *Silliman v. Eddy*, 8 How. Prac. 122 (123). In other words, the terms "demand" and "claim" as used in the complaint, are synonymous.

The argument of appellant is not within the allegations of the amended complaint. On page 6, it alleges: "Where property is obtained from another by fraud, either through the crime of larceny, or other more complex manner of theft" a constructive trust arises. The complaint in this case does not plead either fraud or theft. The fifth paragraph alleges that Tiberg had the custody and care of certain property and that this he "wrongfully and unlawfully, and without the leave or consent of the plaintiff, took and carried away from said sluice boxes, \* \* \* and converted the same to his own use, and has, ever since, failed and ne-

glected to account to the plaintiff therefor." This is nothing more than the usual allegation in an action of either replevin or conversion where the plaintiff claims that the original taking was wrongful. There is no allegation that Tiberg practiced any trick or artifice, or that he in any way acted in bad faith. For all that appears on the face of the complaint, he may have carried away this property under a claim of right and title. In fact, the tenor of the entire amended complaint would indicate, and the express allegations of the original complaint show, that Tiberg does claim title. That the allegations of the amended complaint are not sufficient to constitute fraud, see 3 *Words & Phrases*, 2943. Neither is any larceny shown because there is no conviction pleaded. As stated in *Holker v. Hennessey*, 39 L. R. A. 165 (170), "No one can justly be called a criminal until he be convicted of crime." The complaint only alleges that the criminal charge has been "adjudicated". The presumption is that the defendant in a criminal case is innocent. Therefore, the presumption must be, where the allegation is merely that the charge has been adjudicated, that he has not been convicted.

The appellant makes no claim that under the circumstances pleaded there can be any trust except where the fund is found in the hands of either "a voluntary assignee, a depository, or in the possession of anyone holding in bad faith." It is obvious that the clerk, under the circumstances, is neither

a voluntary assignee nor a person holding in bad faith. The appellant, therefore, concludes: "In this case the holding of the clerk must be treated as that of a depository for the true owner." We ask, On what authority? Appellant's evident argument is that because the clerk is not holding in either of the other two capacities, he must be holding as a depository. That is, that the clerk must necessarily be holding in some capacity which will permit the appellant to impose a trust on this fund, and as there could be no valid argument that he is holding in either of the other capacities, he must certainly be holding as a depository. We commend this for the inventive ability, though not for the logic, shown. The term "depository for the true owner" is a new creation. It seems never to have been used before appellant's brief was written. A depository is a bailee in a contract of *depositum* and such a relationship may only be created by contract. 13 Cyc. 794, 795. There must be mutual assent by both the bailor and bailee. 9 Am. & Eng. Enc. L. (2d ed.) 283, 284. Before there can be a *depositum*, there must be a delivery. 13 Cyc. 795, 9 Am. & Eng. Enc. L. (2d ed.) 284. The consent of the delivering party, that is, in a contract of *depositum* the bailor, is necessary before there can be a delivery. *Rhodes v. School Dist.* 30 Me. 110. Official responsibility as a public officer does not create a contract of *depositum*. *Samuels v. McDonald*, 33 N. Y. Super. Ct. 211, 11 Abb. Pr. 344; 42



How. Pr. 360. In the last cited case, there was an attempt to hold immigration officers liable for the safe delivery of baggage on the theory that the duties cast upon them by law created a contract of *depositum*, which theory the court repudiated.

Appellant's brief does not contain a single case that is in point under the circumstances of this case. The decisions in *U. S. v. Carter*, involved nothing more than an attempt of an agent to make a secret profit for which he was held liable. The *Aetna Indemnity Co.* case, 131 N. W. 200, is not in point, as it there appears that there had been a conviction. The courts of Nebraska and New York have gone to some length with the constructive fraud doctrine. The courts of none of the other states have gone as far, but the courts of New York and Nebraska have not held that there can be any constructive trust where the defendant in a criminal case has been acquitted, that is, where no felony was, as a matter of fact, committed. While the correctness of the rule as laid down in the Nebraska and New York cases does not really concern us here, we call attention to the fact that this doctrine was doubted by the Supreme Court in *U. S. v. Bitter Root D. Co.*, 200 U. S. 451, 50 L. ed. 550 (563). In that case a bill was filed in equity for the purpose of recovering from the defendants the value of certain timber alleged to have been wrongfully cut and taken by the defendants and converted to their own use from the public lands belonging to the complainant (U.



S.) in the state of Montana. The bill alleged that the cutting and carrying away was without license, authority, or permission and was done in violation of both civil and criminal laws, and that by reason of certain frauds and conspiracies and complications which resulted therefrom, the complainant had no plain, adequate and complete remedy at law. Justice Peckham, in delivering the opinion, referred to the "liberal use in the bill in this case of averments in regard to fraud, conspiracy, and violation of trust, and in the course of the opinion, in answer to an argument that a fiduciary relationship existed of which equity would take cognizance, said:

"The government contends that by reason of the duty of the Bitter Root Development Co. to keep true and accurate accounts and to monthly submit statements to the officers of the government, and by reason of its failure so to do, the proceeds of the lumber retained by it became in its hands a trust fund belonging to the complainant; that there was a pledge of this trust; its extent is in the defendant's knowledge; and in such cases choice of remedy is with the party aggrieved and he may proceed in equity for an accounting and pursue the fund. It is doubtful, to say the least, whether an obligation to report as to timber cut on the permitted lands constitutes any fiduciary re-

lationship between the licensees and the government, with regard to the alleged wrongful cutting of timber on other and separate lands.”

In that case a demurrer to the bill was sustained. We think that this is at least an indication that the Supreme Court will not countenance such an extension of a constructive trust jurisdiction as is contended for in New York and Nebraska.

We have no fault to find with the argument that a legal remedy is not exclusive where there is a well-recognized prior equitable jurisdiction. The trouble with that argument is that it presupposes an equitable jurisdiction which does not exist in the case at bar.

In *Borchert v. Borchert*, 115 N. W. 35, the ground of equitable jurisdiction was rescision and cancellation of a contract. In other words, there was a separate, independent and well-recognized ground of equitable jurisdiction. That case is authority for the appellee.

Appellant goes far afield in trying to make the law respecting the right of a person injured by crime to bring a civil suit, before the termination of the criminal suit, apply to the case at bar. The statements quoted from *Cooley on Torts* and from the Florida case of *Williams v. Dickinson*, and the opinions in the cases cited, simply hold that when a crime gives rise to a cause of action in a civil suit,

the injured party does not need to wait until the criminal case is terminated before a civil suit can be brought. In other words, if A assaults and beats B, B can bring a civil suit for damages regardless of any criminal prosecution. That has nothing to do with the case at bar. Here the argument is that a constructive trust can be impressed upon certain property on the theory that that property was obtained by a felony, although no felony is pleaded. The only way that it could be established that a felony was committed would be a verdict of guilty. If there had been a verdict of guilty, the conviction would have been treated as an adjudication that the property belonged to the prosecuting witness. On no other theory can the summary power to dispose of property after conviction be upheld. It necessarily follows, therefore, that a verdict of acquittal is an adjudication that no felony of the described property was committed from the prosecuting witness. Appellant argues on page 12: "If then the offense against the dignity of the state need not first be disposed of, how can it be said that the question of either acquittal or conviction is pertinent in this case?" Why, then, did it plead that the criminal charge was "now adjudicated?"

On page 12, appellant claims that among the allegations necessarily admitted by the demurrer "are those of the larceny by Tiberg". As the complaint contains no such allegation, it follows that

there was no such admission. There is no allegation in the complaint that is not perfectly consistent with the taking by Tiberg under claim of right and color of title.

The case of *Lightfoot v. Davis* turns on a different point. In that case, the alleged thief was dead, so no personal judgment could be rendered, which fact the court points to as giving an equity court jurisdiction. The case is more in the nature of an accounting and does not decide that larceny alone raises a trust.

In *Jaffe v. Weld*, a demurrer to the complaint was sustained and the New York court there indicated an intention to at least limit the constructive trust doctrine in that state. The only holding in point here is that the proceeds of a draft cannot be followed. In *Bishop v. Howe*, a wife was seeking to set aside conveyances made by her to property purchased with funds embezzled by her husband, the conveyances having been made to prevent criminal prosecution. The court held that there had been no coercion and dismissed the bill on the ground that a just restitution had been made.

The *American Sugar Refining Co.* case is certainly not in point. That was a suit in equity under special circumstances to follow credits. Property had been procured by a vendee by fraud. This property he had sold so that the rescission of the contract did not furnish a complete remedy. But,



inasmuch as the vendor was entitled to rescind the contract while the property remained in the vendee's hands, it permitted the vendor to hold the money due the vendee on subsequent sales. This was a decision in the state court under a code and is scarcely applicable to an equity case in the Federal Court, but in any event the New York court there carefully limited the rule expounded, one of the limitations being that it ought strictly to appear that the plaintiff has no adequate remedy at law. The case of *Holmes v. Gilman* involved a partnership. One of the partners purchased insurance with partnership funds. The court held that the policies belonged to the partnership. In *Bosworth v. Allen* an action was commenced against the directors of a corporation to compel them to account for secret profits made by them as the result of a conspiracy to wreck the corporation. The *Nebraska National Bank* case is not applicable because there was not in that case an acquittal and the argument of the court respecting constructive trusts where no fiduciary relationship existed, is certainly contrary to the ruling of the Supreme Court in the *Bitter Root Development Co.* case *supra*.

The argument on page 14 of appellant's brief is that the district judge assigned the wrong reason for his judgment. If that be conceded, a reversal does not necessarily follow. The judgment was right as we have shown in our opening brief,



and the correctness of the judgment is not affected by any reason assigned therefor.

The appellant, on page 8, suggests that the bill in this case "might be treated as in the nature of such motion or petition," referring to a motion or petition under Sec. 2375 Comp. L. of Alaska. The bill on its face, as well as the admissions made in appellant's brief, shows that this is a bill in equity. It certainly cannot be treated as a pleading in some other case between different parties.

Appellant seems to contend, on page 13, that the amended bill shows a fiduciary relationship prior to the claimed taking of the gold dust. This fact would in no way avoid the rule that the property must first be returned to Tiberg before it can be made subject to any process. Moreover, if there was a prior trust relationship, it cannot be assumed, and it is certainly not pleaded, that if Tiberg regains possession of this fund he will not apply it according to the trust. There is no allegation in the amended complaint as to what Tiberg will do with the property if he recovers it, and it is elementary that the court cannot assume that a man would not carry out his legal obligations. Again, if a shovel man in a mine can be such a trustee, one of Tiberg's duties as trustee is to reduce the trust fund to possession and recover it from persons wrongfully in the possession thereof. It would be unheard of for an equity court to hold that such is the duty of a trustee, but that the very

court which imposes such duty will restrain him from doing his duty. The fact is that the added allegation to the amended bill is a palpable attempt at evasion and that the conclusions therein are negatived by the bill taken as a whole.

In the last paragraph of appellant's brief, it argues, in effect, that appellant was entitled to an injunction, if it had a right to maintain the action, and asks the court to reinstate "the injunctive order". There never was an injunction. There was only a temporary restraining order that certainly cannot be continued indefinitely and there is no authority for the proposition that an injunction is a matter of right, if a bill in equity is good against demurrer. Their major premise is not stated. The minor premise is: The bill is good against demurrer. The conclusion is: Therefore an injunction should be granted. The only major premise which would logically permit of this conclusion is: An injunction should be granted in every case in which the bill is good against demurrer. This court, in common with all other courts, having held to the contrary, we need not pursue the subject further.

Respectfully submitted,

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Attorneys for Appellee, Johan Tiberg.



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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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PIONEER MINING COMPANY,  
a corporation,

*Appellant,*

vs.

JOHN TIBERG, et al.,

*Respondents.*

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APPELLANT'S REPLY BRIEF ON MOTION  
TO DISMISS AND ON MERITS.

I.

The respondent's first motion is to dismiss the appeal on the grounds:

(A) That under Secs. 1336 and 1337 of Compiled Alaskan Laws and under Sec. 5 of the Act of March 3, 1891, creating the Circuit Courts of Appeal, this appeal should have been taken to the Supreme Court because a constitutional question is involved, either in the construction or application of the Constitution.

(B) Because transcript is not properly certified.

(C) Because record before the Court shows, among

other things, an attempt to review an order dissolving a restraining order and denying an injunction *pendente lite* without including in record evidence and affidavits used on hearing.

(A) *No appeal lies to the Supreme Court in this case.*

No appeal to the United States Supreme Court lies in this case under Secs. 1336 and 1337 of the Compiled Laws of Alaska as claimed by appellee, because there was involved in the judgment no question of the "construction or *application* of the Constitution of the United States."

The judgment followed the order sustaining the demurrer to the amended complaint, and any question of "construction or application of the constitution" which can be said to have been determined by the judgment must be found to necessarily inhere in the Court's decision of the demurrer. The demurrer was general and not special, and the claim made, namely, that the complaint did not state facts sufficient to constitute a cause of action, manifestly could not raise any question of "construction" of the Constitution.

The sole contention must then be that the general demurrer raised a question of the "application" of the Constitution—that is, that the facts alleged in the amended complaint, if read and considered in the light of the Federal Constitution, did not show that the plaintiff was entitled to the relief demanded.



Can it be said in this case that some provision of the Federal Constitution alone must bar plaintiff's right to recover under the facts pleaded?

The answer must be in the negative, because:

*First*—The Fourth Amendment as to unreasonable searches and seizures is held to apply only to criminal cases and to have no application to civil proceedings.

*Den vs. Hoboken Land Co.*, 18 How., 274;

*Matter of Meador*, 16 Fed. Cas. No. 9375;

*In re Strouse*, 23 Fed. Cas. No. 13,548;

1 Sawyer, 605;

*United States vs. Boyd*, 116 U. S., 633.

It appears from the complaint, it is true, that a crime had been committed and the criminal proceeded against by appropriate criminal proceedings, but nothing transpiring in those proceedings which might raise a question under the Fourth Amendment can make the Amendment a bar in proceedings subsequently instituted to determine the civil rights of the parties interested.

*United States vs. Stone*, 167 U. S., 178. It must follow that the Fourth Amendment can have no proper application to the facts alleged in the complaint and raise no possible issue under a general demurrer thereto.

*Second*—But if the foregoing reason were not sound and if the Fourth Amendment may be said to apply

to the facts pleaded in the complaint, no issue as to such application can be raised by a general demurrer, in that, the immunity guaranteed is as against "unreasonable" searches and seizures and its violation can only be determined in view of all the circumstances of the particular case.

*Mason vs. Rollins*, 2 Biss., 99; 16 Fed. Cas. No. 9,252.

If mere "search or seizure" were the *sine qua non* of the Amendment it might be reasonably contended that its "application" to a given state of facts might be determined as a matter of law.

But inasmuch as the guaranteed immunity is as against "unreasonable" searches and seizures, any question as to its violation must be raised by plea or answer rather than by demurrer in that it is necessarily a mixed question of law and fact.

It is submitted that the facts alleged in the complaint concerning what is claimed to be a violation of the Amendment are not so circumstantial as to warrant a judicial conclusion that there had been an "*unreasonable search or seizure*."

*Third*—The immunity guaranteed by the Fourth Amendment is as much a personal privilege as that guaranteed by the Fifth Amendment in respect to a defendant in a criminal case being compelled to testify against himself, and being purely a matter of personal privilege and therefore capable of being

waived, it must be claimed or asserted before it can become effective.

If the Fourth Amendment by its application to the facts here pleaded will raise a bar to recovery, then certainly an assertion of its violation by defendant is necessary to the presentation of such an issue.

Surely a general demurrer is not enough to present such an issue of confession and avoidance as is contended for by respondents.

As to the intimate relation between the Fourth and Fifth Amendments the United States Court said in *Boyd vs. U. S.*, 116 U. S., 633:

“They throw great light on each other. For the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man ‘in a criminal case to be a witness against himself,’ which is condemned in the Fifth Amendment, *throws light on the question as to what is an ‘unreasonable search or seizure’ within the meaning of the Fourth Amendment.*”

It has never been disputed that the Fifth Amendment as to compulsory testimony becomes effective only upon a claim of the privilege of immunity. It has never been denied that the privilege of immunity could be waived.

From the Court’s expression in *Boyd vs. United States*, given above, it is manifest how inapplicable the Fourth Amendment is to a civil case.

The question of immunity here raised under the Fourth Amendment could not even have been raised in the criminal case referred to in the complaint, for it is the settled law that the use of the subject of such a search and seizure for evidential purposes does not violate the constitutional guaranty.

*Adams vs. New York*, 192 U. S., 597;

*Bacon vs. U. S.*, 97 Fed., 40.

*Fourth*—Even if a question of constitutional construction or application were present in the decision on the demurrer and the judgment which followed, the United States Supreme Court would refuse to assume jurisdiction to review.

1. Because the question, if present at all, was only incidentally involved and not directly drawn in question.

*Blythe vs. Hinckley*, 173 U. S., 501;

*Kittaning Coal Co. vs. Zabriskie*, 176 U. S., 681;

*Arkansas vs. Schlierholz*, 179 U. S., 598;

*Richards vs. Mich. R. Co.*, 186 U. S., 479;

*Chapin vs. Fye*, 179 U. S., 127;

*Loeb vs. Columbia Town Trustees*, 179 U. S., 472.

2. Because it does not appear that the question was

not only present directly, and not incidentally, but was controlling as well.

*Empire etc. Co. vs. Hanley*, 205 U. S., 225, 232;

*In re Lennon*, 150 U. S., 393;

*Carey vs. Houston etc. Co.*, 150 U. S., 170;

*Commercial Bank of Rochester vs. City of Rochester*, 15 Wall., 639-642;

*Cosmopolitan M. Co. vs. Walsh*, 193 U. S., 460.

3. Because it does not appear that the question of the construction or application of the Constitution, as directly involved and controlling in its effect, was distinctly presented for decision in the trial court.

*Empire etc. M. Co. vs. Hanley*, 198 U. S., 292, 298.

We shall argue "B" and "C" together.

*B. and C. The certificate of the clerk, while not strictly in form, is sufficient and the transcript contains all that is "necessary to a hearing in this court."*

A consideration of the transcript in detail and of the Bill of Exceptions will show that the certificate covers all the record of the proceedings below necessary in the hearing of this appeal.

Before arguing this proposition we may be pardoned for digressing a little from the sequence of the numer-



ous motions presented by counsel, to dispose of the fourth motion, namely, that to strike the Bill of Exceptions.

Counsel betrays a lack of familiarity with the provisions of the Alaska code, which doubtless accounts for this futile motion, and attempt thereby to convict counsel for appellant of unfair dealing with the Court.

Section 1055 of the Code of Civil Procedure of Alaska (Carter Code, Sec. 223) provides:

"The statement of the exceptions, when sealed and allowed, shall be signed by the Judge and filed with the Clerk and thereafter it shall be *deemed and taken to be a part of the record of the Court*. No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the Court."

The Bill of Exceptions is therefore a part of the *record* on this appeal.

*Sutherland vs. Pearce*, 186 Fed., 783.

And such Bill of Exceptions imports verity and we cannot look beyond the record to impugn the same. Certainly this cannot be done by affidavits filled in the Appellate Court.

*Moss vs. Gulf Compress Co.*, 202 Fed., 659;

*Bank vs. Eldred*, 143 U. S., 293, 36 L. Ed., 162;

*Honey vs. Railroad Co.*, 82 Fed., 773;

*Rollins vs. Board*, 78 Fed., 741;

*Case vs. Hall*, 94 Fed., 300, 302;

*First National Bank vs. Wilder*, 100 Fed., 223.

To appreciate the significance of this fact as applied to the case at bar, we call the attention of the Court to the Bill of Exceptions (Tr., 36):

“By way of provisional remedy plaintiff sought an injunction *pendente lite*. In the latter proceedings an order to show cause why the injunction should not be granted was made and returnable at a time and place designated and defendant Tiberg was, by said order in the meantime and *until the further order of the court* restrained from demanding or receiving said proceeds. . . . Judgment of dismissal of the action . . . was thereupon, plaintiff electing to stand on its complaint on the 18th day of August, 1913, entered, . . . In the injunction proceedings above mentioned, *the demurrers to the original and amended complaints having been sustained and the plaintiff electing not to plead over, the plaintiff's motion for injunction pendente lite was*, on the 18th day of August, denied and the restraining order theretofore issued dismissed; to all of which the plaintiff duly excepted and exceptions were allowed . . . .”

This Bill of Exceptions proposed was presented to and was accepted by the appellee. No exceptions appear to have been taken to its form or substance. And thereafter the Court below approved, allowed and settled the same as “correct in all respects” and made it “a part of the record” (Tr., 38).

There can be no other construction of the language of the Bill of Exceptions than that the action of the Court below in overruling the motions for an injunction *pendente lite* was based and could only have

been based, not upon any evidentiary matters before it, but upon the fact that having overruled the demurrer to the amended bill and dismissed the action for lack of equity, there was therefore nothing before the Court on which to maintain an injunction *pendente lite*. For this reason no evidence was offered, nor does the record in any respect show that any evidence was offered or could legally have been considered by the Court on the ancillary motion. It is true there is a statement taken from the minutes of the Court (Tr., 35) that on the hearing of the motion for the injunction *pendente lite* on August 18th, "Atty. G. J. Lomen on behalf of plaintiff filed the affidavit of Lewis Stevenson" and "the deposition of defendant Johan Tiberg was ordered published." The motion was submitted without argument.

But there is nothing in the record to show that the affidavits or the deposition were read or considered by the Court in deciding the ancillary proceeding or that any other affidavits were introduced in evidence or filed. And the bill of exceptions certainly is authority to the contrary, i. e., that no evidence was used on the hearing but that the Court *ipso facto* by reason of the judgment of dismissal of the complaint, denied the motion, and dissolved the restraining order.

Where a case is disposed of by demurrer to the bill, the evidence on file is not necessary to a hearing of the appeal.

*Missouri, Kansas & Texas R. R. Co. vs. Dinsmore*, 108 U. S., 640; 27 L. E. P., 640.

There is no merit therefore in any of the motions directed to the striking of the transcript in the appeal from the order denying the injunction *pendente lite* based on the ground that there has been an omission of evidence from the record. The Clerk in following the *praecipe* of counsel for appellant (Tr., 48) regarding the making up of the record had no discretion to exercise in the matter because in carrying out such instructions he could do no more than he did actually do,—send to this Court a full, complete and true transcript of the proceedings in the court below “necessary to a hearing in this Court” under its rules.

To return to the certificate. Assuming for the purpose of the argument, that the affidavits and deposition referred to were entitled to have been made a part of the transcript here as having been introduced in evidence below, we submit that the sixth motion of appellee, viz: for a diminution of the record, would have been productive of all that he desired in that respect (should this Court grant the same which under the legal aspect of the case asserted by us, it would be error to do), without beclouding the real issue presented to this Court by a multitude of argumentative motions covering some sixty pages of printed matter.

The power of this Court to dismiss an appeal for an inherently defective certificate or transcript or for a failure to file the transcript in the manner or within



the time prescribed by the statute and the rules is admitted, but it is a power that the Court hesitates to exercise when the rights of all the parties may be preserved by less drastic measures.

In one of the cases cited by appellee, viz: *Idaho & Oregon Land Improvement Co. vs. Bradbury*, 132 U. S., 509, 518; 33 L. Ed., 433, where the certificate was not even signed by the Clerk, the Supreme Court in refusing to dismiss on that ground, say:

“In support of this motion reliance is placed on *Blitz vs. Brown*, 7 Wall., xxx, in which the only certificate of authentication was a blank form wanting both the seal of the Court below and the signature of the Clerk so that there was really no authentication whatever and this Court therefore dismissed the writ of error, but permitted the plaintiff to withdraw the record for the purpose of suing out a new writ. But in the case at bar the certificate not only begins with setting out the name and office of the Clerk as the maker of the certificate, but has appended to it the seal of the Court and lacks only the Clerk’s signature to make it conform to the best precedents. The question is not one of no authentication, but irregular or imperfect authentication; *not of jurisdiction but of practice*. It is therefore within the jurisdiction of this Court to allow the defect to be supplied.”

In the case of *Burnham vs. North Chicago St. Ry. Co.* (C. C. A., 168), where a necessary part of the record had been omitted from the transcript and was subsequently presented duly certified to the Court of Appeals, it was held to be made a part of the record



by a direct order without requiring certiorari. The Court after holding that the jurisdiction attached by the filing of the writ of error said:

“The objection that the transcript is not authenticated as a full and complete transcript but only as a ‘true and correct transcript from the filing of the mandate’ issued from this Court on a former appeal does not affect the jurisdiction, which as the cases show, attached upon the filing of a writ of error in the office of the Clerk of the Circuit Court.”

And referring to *Redfield vs. Parks*, 130 U. S., 623, 32 L. Ed., 1053, a case relied upon by appellees to sustain the motion to dismiss, said:

“In *Redfield vs. Parks* there was a like objection to the authentication of the transcript but more than three years having elapsed before the motion to dismiss was entered and the case having been submitted on both sides on the merits, the Court gave leave to the plaintiff in error to sue out a certiorari to bring up the papers omitted from the transcript. *Jurisdiction cannot be conferred by agreement and if the proper authentication had been essential to jurisdiction in that case it could not have been waived by filing briefs or otherwise.*”

In view of the only conclusions either of law or fact to be drawn from the record including the minutes of the Court, of August 18th, relative to the denial of the injunction *pendente lite*, i. e., that no evidence was or could have been considered by the Court in determining the motion whatever affidavits may have been filed or deposition published at the time, we quote again

the pertinent language of the Court from the case last cited:

“While this disposes of the motion to dismiss . . . we deem it proper here besides calling attention to the remarks of the Chief Justice in *Railway Co. vs. Stewart*, 95 U. S., 279, in respect to what should be contained in the transcript to say that the words ‘all proceedings in the case’ as used in the first clause of Rule 14 of this Court . . . are to be interpreted with reference to the words ‘*all the papers, exhibits, depositions and other proceedings which are necessary in the hearing in this Court*’ found in the third clause of the Rule. *It is not intended that irrelevant papers, proceedings or orders shall be certified*; and that the clerk may not be left in doubt, he may well require of the counsel or attorney of the appellant or plaintiff in error in the cause, a praecipe stating specifically what the transcript shall contain and attaching a copy of the praecipe to the transcript, certify that it is a true and correct transcript according to the praecipe.”

Practically what was done in the case at bar. The certificate shows that the Clerk had received a praecipe for the transcript from the counsel for appellant, followed and embodied it in the record forwarded to this Court.

In the case of *Meyer vs. Mansur & Tebbets Imp. Co.*, 85 Fed., 874, 29 C. C. A., 465, cited by appellees, no such praecipe is shown and the Court there inferentially held that if there had been such a praecipe its action might have been different, it says:

"It must be borne in mind that in this case there is neither a certificate of the Clerk attesting a full transcript nor a stipulation of the parties as to what documents shall constitute the necessary papers, *nor a statement by the Clerk that he was guided by the appellant's solicitor in selecting the papers necessary to constitute the transcript.*"

An examination of the balance of the cases cited by counsel will show that they are not in conflict with the rule which we state as to the authentication of the record or the procedure generally followed by the Appellate Court in the absence of negligence or indifference on the part of the appellant, namely, that the appeal will not be dismissed but the defects permitted to be rectified by a certiorari or otherwise.

*Flickinger vs. First National Bank*, 145 Fed., 162;

*Hudgins vs. Kemp*, 18 How., 350; 15 L. Ed., 511, 514;

*Missouri, K. & T. R. R. Co. vs. Dinsmore*, 108 U. S., 30; 27 L. Ed., 640;

*State of Kansas vs. Meriweather, et al.*, 171 Fed., 39.

The cases referred to by counsel where there has been a dismissal were extreme ones.

In *Blitz vs. Brown*, there was no certificate and the case was dismissed.

In *Keene vs. Whittaker*, the case had gone to the Supreme Court on an agreed statement of facts and in

the absence of "any of the proceedings in the Court below being in the record" the case was dismissed.

In the case of *Grigsby vs. Purcell*, the appeals were not docketed nor was any transcript filed during the term to which the appeal was returnable.

In the case of *Ray vs. Law*, the appellant having been refused an appeal below, on the ground that his decree was not final, applied to the Supreme Court, to allow the appeal and order the Court below to send up the record, at the same time producing "sundry papers purporting to be the substance of the record but not properly authenticated." The Court refused to do anything without seeing the record and held the papers offered could not be considered as such. There is nothing to show in this opinion of one paragraph, as to what this record consisted of. The decision is of no value whatever on this point.

The same thing must be said of *Campbell vs. Reed*. No certificate at all was shown there.

We quote the language of the Court in the Case of *Ruby vs. Atkinson*, another of the cases cited by appellees to support their motion:

"The clerk's certificate to the alleged transcript is insufficient. It is limited to the correctness of the pleadings, omits all reference to the decrees or orders of the Court and the proceedings to bring up the case on appeal and only certifies the evidence as furnished by the counsel for appellants, 'which is said by him to be agreed upon by counsel for both parties'."

The Court, however, dismissed the appeal for another reason entirely, namely, that no citation of appeal was issued to one of the principal defendants.

It would be a useless waste of the time of the Court for us to criticize further the cases cited by appellees.

Practically the only substantial objection made to the certificate and to the transcript (when the objections of the appellee are analyzed), is that neither the certificate nor the transcript discloses that the evidence alleged in the affidavits filed on these motions to have been presented on the hearing of the motion for injunction *pendente lite*, were included.

We submit that while the form of the Clerk's certificate might have more technically complied with the statute, still it substantially met the requirements thereof. It discloses every document necessary to a hearing of the appeals pending before this Court, and states that they are true and exact transcripts "as appears from the records and files in his office"; it discloses that the same was made upon the praecipe of appellant's counsel for the transcript and the record embodies a copy of this praecipe and the certificate is signed by him as Clerk under the seal of the Court.

Upon the foregoing points we maintain finally:

(a) That such evidence was not and could not legally have been considered by the Court below in deciding such motion, even if it were before the Court. If the bill does not state a cause of action to give the



Court jurisdiction, certainly no evidence offered on the ancillary hearing could do so.

(b) That the bill of exceptions is conclusive on this point.

(c) That the decision sustaining the demurrer and dismissing the bill was decisive on the motion for injunction *pendente lite*, and such evidence, even if introduced on the hearing, would not be necessary to a hearing in this Court (*Missouri, K. & T. R. R. Co. vs. Dinsmore, supra*) under the rules. If the complaint did not state a cause of action for an injunction and the Court had dismissed the same for that reason, then no evidence we could offer on the order to show cause would be available to show to this Court that we were entitled to an injunction or that we were not entitled to an injunction. This is elementary. Therefore the transcript is complete.

(d) If by any possibility this Court should hold we are wrong in this, which we emphatically doubt, then we maintain that we have shown by the record our good faith in giving to the Clerk the praecipe for the transcript from our understanding of what was necessary on the appeal and the transcript as sent up by him was prepared in good faith; and if this Court holds the same to be defective it is not through any negligence or indifference shown on our part, but rather from a desire to avoid the expense and unnecessary cumbering of the record with the printing of

useless papers. Under such circumstances appellees should be confined to their writ of certiorari for a diminution of the record.

*State of Kansas vs. Meriweather*, 171 Fed., 39.

## II.

The Supersedeas was rightfully granted.

The Court had an inherent right, while sitting in equity to maintain the *status quo* until a decision of the Appellate Court could be had in the matter.

*Merrimack River Savings Bank vs. Clay Center*, 219 U. S., 55; L. Ed., 32;

*Hovey vs. McDonald*, 109 U. S., 139;

*U. S. vs. Stone*, 187 Fed., 850, 857;

*Western Union Tel. Co. vs. Wright*, 168 Fed., 557;

*Cotting vs. Kansas City Stockyard Co.*, 82 Fed., 850, 857.

In the case of *Merrimack River Savings Bank vs. Clay Center*, *supra*, where the bill was dismissed on demurrer, the United States Supreme Court say:

“The plain purpose of the order continuing the injunction pending this appeal was to preserve the subject matter of the litigation until the rights of the complaint could be heard and determined. It is well settled that the force and effect of a decree dismissing the bill and discharging an injunction is neither suspended nor annulled as a mere con-

sequence of an appeal to this Court even if a supersedeas is allowed. . . .

"That the Circuit Court to the end that the *status quo* might be presented pending such appeal had the power to continue an injunction in force, by virtue of its inherent equity power is not doubtful."

Citing the case of *Hovey vs. McDonald*, and the *Slaughter House cases*, 10 Wall., 273.

In the case of *Western Union Telegraph Co. vs. Wright*, *supra*, the bill also was dismissed and a temporary restraining order was dissolved, but the Court allowed a supersedeas. So too, in *Cotting vs. Kansas City Stockyards Co.* *supra*, the same action was taken.

Admitting all of appellee's contentions as to no appeal being permissible from either the restraining order or from the order dissolving the same, we are still here on an appeal from the order denying the injunction *pendente lite*.

It is immaterial that there was not in terms a temporary restraining order in existence at the time of the making of the *status quo* order. It is undisputed there was a restraining order until the hearing of the order to show cause and "the further order of the Court" (Tr., 10-11). And the record shows that there was a hearing on the order to show cause on August 18th, 1913.

The minutes of the Court of that day state that "the preliminary restraining order heretofore issued

herein be dissolved," and upon motion of G. J. Lomen, counsel for plaintiff, "it was ordered that the property in controversy in the action remain in *statu quo*, to wit: in the hands of the Clerk for the present and "until the further order of the Court" (Tr., 35-6).

This is further confirmed by the Bill of Exceptions which recites that the "motion for injunction *pendente lite* was on the 18th day of August denied and the "restraining order theretofore issued, dismissed . . . "on motion of plaintiff and notice of appeal being "given, the Court thereupon fixed the amount of the "supersedeas bond at \$3,000, and ordered the proceeds aforesaid to be held in *statu quo subject to "the further order of the Court"* (Tr., 37).

It is therefore clear that the restraining order was in the contemplation of all parties to the record in full force up to August 18th, 1913, when it was dismissed and the notice of appeal being given, the Court substituted the *statu quo* order which was in itself a re-instatement of the restraining order pending the perfecting of the appeal.

*United States vs. Stone*, 187 Fed., 579.

This was followed by the petition for the allowance of the appeal, on October 9, and the order allowing the same and fixing the amount of the supersedeas bond on the same day, the Court used the following language:

"It is further ordered that upon the filing of

said bond (for \$3250) the order heretofore made (the order above referred to of August 18th) directing the trust fund involved in said action to remain in *statu quo* in the hands of the Clerk of said Court be, and the same is hereby continued pending said appeal and the further order of the Court" (Tr., 44).

This order was, under the decisions cited, within the inherent equity power of the Court to make.

Considerable weight is placed by counsel in the *statu quo* order being void, because, as they allege, there was no notice given to Tiberg, or process served. Their contention is that under the Alaskan code, having demurred, this constituted an appearance and he was entitled to twenty days' notice thereafter of all proceedings including the time appointed for the hearing of the *statu quo* order.

Both the *statu quo* order of August 18th and that of October 9th, were made in *open Court*. The record being silent on the point of whether there was no notice, or whether appellee was not represented, and the orders having been made, every presumption must be indulged in favor of the jurisdiction of the Court to make the orders.

The District Courts of Alaska are courts of general jurisdiction and are within the rule that such courts, in the absence of a showing to the contrary in the *record*, have proceeded within the general scope of their powers and that their orders and judgments have been given with authority.



*Nelson vs. Meehan*, 155 Fed., 1;

*Equitable Trust Co. vs. Fowler*, 141 U. S., 384;

*Stocksloger vs. U. S.*, 116 Fed., 590;

*Galpin vs. Page*, 18 Wall. (U. S.), 350.

Says Mr. Justice Field, in *Galpin vs. Page*, *supra*:

"It is undoubtedly true that a Superior Court of general jurisdiction proceeding within the general scope of its powers is presumed to act rightly. All intendments of law in such a case are in favor of its acts.

"It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not alone of the cause or subject matter of the action in which the judgment is given, *but of the parties also.*"

This presumption of jurisdiction by notice to Tiberg applies to the proceedings in Court on the allowance of the appeal and the fixing of the undertaking and granting of the supersedeas (if notice could be deemed necessary), as well as on the 18th of August, when the original *statu quo* order was made. And is equally applicable to its jurisdiction to hear the order to show cause.

If appellee felt himself aggrieved by the failure to hear the order to show cause on the original day set, his remedy was to move to dismiss the restraining order at any time thereafter, or to have had the Court fix a bond. He cannot now be heard to complain because he acquiesced in the action of the Court.

So far as the amount of the bond on appeal is concerned, that was a matter within the discretion of the lower Court, and counsel should have moved the Court below to increase the same if he felt it was insufficient.

*Rose's Federal Procedure*, Vol. 2, Sec. 2014;  
Section 1000, R. S. U. S.;  
*Jerome vs. McCarter*, 21 Wall., 17; 22 L. Ed.,  
515.

In the case cited, the Supreme Court, after affirming this rule, say:

“ . . . where the judgment or decree is for the recovery of money . . . or where the property is in the custody of the marshal under admiralty process . . . or where the *proceeds thereon or a bond for the value thereof is in the custody of the Court*, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of suit and just damages for the delay and costs and interest on appeal . . . .”

This, of course, is subject to the modification that where *after* appeal, facts arise which show that the character of the security has changed, and is not as good and sufficient as when the original order was made, this Court may require additional security. No such condition is shown to exist here.

The final motion, i. e., for diminution of the record, is, we think, covered by what we have said relative to

the motions to strike the transcript and to dismiss the appeal on the ground that the certificate of the Clerk and the transcript do not comply with the statute.

#### ON THE MERITS.

We discussed in our opening brief the main point in this case as we see it, i. e., whether or not a constructive trust may be impressed upon the proceeds of stolen property when found and identified, and whether such trust was shown by the allegations of our amended bill. We shall make no attempt to again go over that ground, but refer the Court to the brief and as briefly as possible will answer some of the voluminous arguments of appellee on the other propositions advanced in his briefs.

And preliminary thereto let us assert that no attempt is made to press assignment of error one on behalf of appellant.

It is elementary that the filing of an amended complaint supersedes the original. Notwithstanding the argument of counsel to the contrary, we rely upon the error of the Court below in dismissing the action based upon the amended complaint. The amended complaint is neither inconsistent with the original nor does it change the cause of action. The main purpose of both complaints is the same, i. e., to establish a constructive trust in the proceeds of the alleged stolen gold; the transaction alleged in both complaints is the same, the theft of the gold and its conversion

into the trust fund. The amended bill contains a prayer for general relief and a court of equity having obtained jurisdiction for one purpose will give the relief found applicable upon a hearing of all the facts.

*Jones vs. Van Doren*, 130 U. S., 684, 32 L. Ed., 1077;

*Brainard vs. Burk*, 184 U. S., 104, 46 L. Ed., 453.

We submit that:

*The proceeds of the stolen property being in the custody of the Clerk of the Court is no bar to the creation of a constructive trust therein, as his possession was in fact Tiberg's possession.*

Appellant was entitled to invoke the equitable jurisdiction of the Court and to preserve the *status quo* of the proceeds of the stolen property until it could be determined whether appellant was equitably entitled thereto.

Is the fact that the Court on its law side, through its Clerk, has the possession of the proceeds of the stolen property, to be set up as an aid to the thief to defeat the right of the equitable owner of the property to sustain the bill herein, showing as it does the existence of a constructive trust in other respects? That is the argument of the respondent. It is claimed that the Court below sitting as a criminal court, notwithstanding that such Court is the identical Court, judge and

clerk in the equitable action, having first obtained jurisdiction over and the custody of these proceeds of stolen property to be disposed of in whole or in part to the true owner, has its hands tied on its equity side, so far as exercising any act of jurisdiction over such proceeds in the case at bar and that, too, after the termination of the criminal proceeding. Such cannot be and is not the law.

“Equity impresses a constructive trust upon the new form or species of property not only while it is in the hands of the original *wrongdoer* but as long as it can be followed and identified in WHOSE-SOEVER HANDS it may COME.”

*Pomeroy's Eq. Jur.*, Secs. 1051, 1053, Vol. 3;  
Cases cited, Opening Brief, pp. 13-20.

There is no exception to this rule laid down in the text or in the decisions, other than where it is found in the hands of “*a bona fide purchaser for value and without notice.*”

It would be an anomaly in the law that implied exceptions to this rule should as contended by appellee exist; that such constructive trust shall not be impressed upon stolen property or proceeds thereof when it enters into the custody and control of the law, and especially under the circumstances shown by this bill, where, as we are willing to admit, they are being held by the Clerk for return to Tiberg. That the very power which declares that “wherever one person has “wrongfully taken the property of another and con-



“verted it into a new form . . . the trust arises “and follows the proceeds,” does so with the reservation that such rule does not apply where the law has temporarily obtained its control or custody. No such reservation can be read into the law.

In such event the law itself would be providing a means to the thief to cheat the owner instead of a means to the owner to be placed in possession of his own.

“In contriving means to cheat an owner out of his property, a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found.”

*Aetna Indemnity Co. vs. Malone*, 131 N. W., 200.

*The fact that the amended bill does not show whether Tiberg was acquitted or not is immaterial.*

Appellee objects that the amended bill does not show whether Tiberg had been convicted or acquitted and insists that in the absence of any allegation showing that Tiberg had been convicted that the presumption of his innocence of the larceny prevails and should apply in the civil action for the injunction between Tiberg and third parties; that therefore the bill cannot be maintained on its face, said presumption being read into it.

Whatever presumption of innocence was applicable in the criminal proceeding can have no application

in this independent civil proceeding between Tiberg and the appellant. A new presumption may possibly arise, namely, that every man is presumed to act honestly in his dealings, and to establish our case on the trial it will be necessary that the evidence be strong enough to overcome this presumption.

But even conceding the presumption of innocence of the crime of larceny as urged in our bill, and admitting Tiberg was acquitted, that would not prevent our pursuing our civil remedy against him, nor would it do so had we formally alleged his acquittal in the criminal proceeding. It hardly needs citation of authority to establish this. The Supreme Court of the United States has many times held to the contrary.

In the case of *Coffey vs. U. S.*, 116 U. S., 436-445; 29 L. Ed., 684, a libel was brought against certain personal property as being forfeited to the United States on account of the violation of certain sections of the Revised Statutes, and the defendant filed claim to the property and answered, setting up as one of the defenses that before the institution of the proceedings for the forfeiture a criminal information had been filed in the same court, based upon certain of the Revised Statutes, upon which the forfeiture proceedings were founded, and that the same charges in the criminal information were practically embraced in the matters set out in the libel against the personal property and that he had been acquitted upon the criminal information.

A demurrer was sustained to this part of the answer on the ground that the facts stated were not sufficient to constitute a defense, but the Supreme Court held that the demurrer admitted the fraudulent acts alleged in the criminal information, covered by the verdict and having embraced all the acts alleged in the libel for the forfeiture, the judgment of acquittal in the criminal case was a bar to the proceeding in the criminal.

It was urged on the appeal that the acquittal in the criminal case might have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt and that on the same evidence on the question of preponderance of proof a verdict might be obtained for the government in the action *in rem*, but the Court held that so far as the United States was concerned, the fact or act had been put in issue and determined against it and all that is imposed by the statute as the consequence of guilt is the punishment therefor. There could be no new trial of the criminal prosecution and that a subsequent trial of the civil suit by the United States amounted to substantially the same thing with the difference only in the consequences following to the defendant. *But*, said the Supreme Court:

“When an acquittal in a criminal prosecution in behalf of the Government is pleaded or offered in evidence by the *same defendant in an action against him by an individual, the rule does not apply* for the reason that the parties are not the

same, and often for the additional reason that a certain intent must be proved to support the indictment which need not be proved to support the civil action."

In the case of *Stone vs. U. S.*, 167 U. S., 186; 42 L. Ed., 177-8, the Supreme Court went further. This was an action brought to recover the reasonable value of certain timber cut on lands of the United States. The defendant Stone set up as a defense the fact that he had been tried and acquitted on an indictment brought by the United States for cutting the same timber from the lands, under Revised Stats., Sec. 2461. In holding that the United States could maintain the action and in distinguishing the Coffey case, the United States Supreme Court say:

"The rule established in Coffey's case can have no application in a civil case not involving any question of criminal intent or forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the government sought to punish a criminal offense, while in the civil case it only seeks in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a verdict. Not only was a greater degree of proof requisite to support the indictment than is sufficient to sustain



a civil action, but an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit. In order to convict the defendant upon the indictment for unlawfully, wilfully, and feloniously cutting and removing timber from lands of the United States, it was necessary to prove a criminal intent on his part, or, at least, that he knew the timber to be the property of the United States. . . . But the present action for the conversion of the timber would be supported by proof that it was in fact the property of the United States, whether the defendant knew that fact or not. . . . An honest mistake of the defendant as to his title in the property would be a defense to the indictment, but not to the civil action. . . . It cannot be said that anything was conclusively established in the criminal case, except that the defendant was not guilty of the public offense with which he was charged. We cannot agree that the failure or inability of the United States to prove in the criminal case that the defendant had been guilty of a crime, either forfeited its right of property in the timber or its right in this civil action, upon a preponderance of proof, to recover the value of such property."

But admitting that the defendant Tiberg had been acquitted, as in the case last cited, then the specific purpose for which the law took custody in the criminal proceedings has been entirely fulfilled, viz: the use of such fund as evidence or its use otherwise in connection with or as a result of such proceedings.

Therefore at the most, the purpose for which the Clerk held the moneys was for the return to Tiberg—if the law held the money for any other purpose, the fulfillment of such purpose might be conflicted with



by the enforcement on execution of any judgment in the case at bar. But the law holding these moneys for return to Tiberg and the complaint seeking ultimate relief, to which the appellant would be entitled if the moneys were actually in Tiberg's possession, it is obvious that no conflict can arise.

The appellant would be entitled to the impressing of a trust upon the money if it had been in Tiberg's possession.

See cases cited in Opening Brief, pp. 13-20.

Appellant would doubtless have been entitled to the appointment of a receiver of the money to take possession *pendente lite*.

Therefore, we contend on the proposition of the acquittal of Tiberg on the criminal charge, it is immaterial whether the money is in the custody of the Clerk for the purpose of the return to Tiberg or whether the money is in Tiberg's actual possession.

*Tiberg could not complain of its return to him and certainly cannot claim any more rights because of the fact that the Clerk holds the money for the purpose of returning it to him, than he could if the Clerk had in fact returned it to him.* It is Tiberg's own contention that the duty of the Clerk is to return the money to him. That is the argument of appellee. Under the equitable doctrine that the law considers that as done which should have been done, it seems to us that for the purposes of this case the possession

of the Clerk, while technically custody of the law, is, by implication of law, the custody of Tiberg.

The case being somewhat analogous to those instances where after a person who is entitled to a fund is ascertained, together with the amount to which he is entitled, the custodian in the law then becomes the agent of such party and his possession is the possession of the person ascertained to be entitled to the property.

From the authorities cited in our opening brief it is clear appellant could impress a trust upon these moneys if found in the pocket of Tiberg. And in proceeding against the possession of the Clerk upon the theory that the Clerk's possession is in all legal aspects the possession of Tiberg, it would be seeking no greater rights than it would have had, if the Clerk had turned the moneys over to Tiberg.

On the other hand, if the defendant Tiberg had been convicted in the criminal proceeding, it could hardly be argued that appellant would be powerless to maintain the action. What other remedy would be available to it? The fact of the conviction of Tiberg would not be a judgment that these properties belonged to appellant. They are not the stolen goods in specie. The procedure under Section 2378 of Chapter Thirty of the Criminal Code of Alaska would not be open to it. It must prove that these moneys are the proceeds of its property stolen from it, and the only method open to it, under the allegations of the bill, is by a proceeding in equity. This we think we have conclusively established by the cases cited in

our opening brief, which hold that even in the absence of any showing of a fiduciary relationship, a constructive trust may be established where the proceeds of the stolen property are identified, but here, as the amended complaint in terms alleges, there was a fiduciary relationship, a definite identification of the proceeds of the stolen goods and an allegation of insolvency.

The case of *State vs. Williams*, cited by appellee as conclusive of his rights, was an action where, after an acquittal of the defendant, money was in the hands of the Clerk. The defendant filed a motion for an order for the return of the money to her, which motion the Court denied. Against the objections of the defendant, the Court ordered a jury to be called to try the title to the money. The defendant filed a motion to dismiss the case, which was overruled. A trial to a jury was had, resulting in a verdict for the claimant of the money, the prosecuting witness in the case. The Court on appeal said:

“If the defendant had been *convicted* of stealing the money in question, the duty of the District Court would here have been clear. Section 465 of the Code provides that ‘if the property stolen or embezzled has not been delivered to the owner, the Court before which the conviction was had may, on proof of his title, order its restoration. . . . The Court we presume, might properly proceed to determine such question in a summary way . . . But we have a case where the defendant was acquitted. . . . For such a case the statute *seems to make no provisions*. The

money having been forcibly taken under a bench warrant from a person presumably innocent, it would seem to follow as a matter of course, that the person holding the money in custody would deliver it to the person from whom it had been thus taken. *We do not say* that the judgment of *acquittal* was conclusive evidence of title in the defendant, *all we hold is* that this action having been terminated in the defendant's favor, she was entitled to go out of court and be placed in the same situation in which she was before the money was taken, leaving Miller or any other person who may claim the money, *to pursue his remedy by action in his own name.*"

This is exactly what appellant did in the present case. Appellee cannot complain because appellant elected to pursue his remedy in equity and follow the proceeds of the stolen property, and ask the Court to *preserve it* by its order. Had appellant pursued the same remedy that the plaintiff did in the case cited, it would have been up to appellee to argue that appellant "must proceed by independent action in his own name"; and properly so. Besides, it is to us a new and novel proposition that a third party can intervene in a criminal case and create new issues.

As we have hereinbefore stated, under the Alaska Code no provision is made for the disposition of other than stolen or embezzled property. No mention is made of the proceeds of such property. Section 2377 of Chapter Thirty of the Criminal Code is the only section which mentions other property taken from the arrested person, but is silent as to its disposition.



The Alaska Statute (Sections 2374-2378, Criminal Code) differs from the Iowa Statute controlling in the Williams case, in that it authorizes the delivery of stolen property to the owner, if claimed, irrespective of conviction or acquittal. Had the stolen property been in specie in the custody of the Clerk, the appellant might have availed itself of this section of the code. But the *proceeds* only of such stolen property being accessible, it was necessary to resort to this bill in equity to establish appellant's equitable title hereto.

Bearing in mind that under the rule prevailing in the United States a civil action may be carried on *pari passu* with the criminal prosecution, any judgment in such civil action might, if the Court below was correct in its ruling, be rendered absolutely nugatory by reason of the power of the appellee, if acquitted prior thereto, to demand the return of the property sought to be impressed with the trust and claimed by the appellant and in the possession of the Court; and which doubtless he would be able to do in the absence of any order of the Court restraining him from so doing, or its officers from acting upon such demand.

A court of equity declining to exercise its jurisdiction over property in its custody in order to preserve the same pending a determination of the question as to whether or no it was the proceeds of property of complainant seeking to establish a trust therein (though such custody arose on the criminal side of



the Court), would thus be lending an admitted felon its aid in disposing of the fruits of his crime so as to place them beyond the reach of the law.

We contend that on the contrary, the Court should "*jump all technicalities* and be as astute in discovering "a remedy for upholding the rights of a party as the "thief is in discovering ways and means of cheating "him out of his property and the avails of it."

*Newton vs. Porter*, 5 Lans. (N. Y.), 416;  
See Opening Brief, p. 7.

Counsel seek to minimize the effect of the cases cited by us in opening and refers especially to the case of *United States vs. Carter*, 172 Fed., 1, and 217 U. S., 49, L. Ed., 769, as being overruled by the later case of *United States vs. Bitter Root Development Co.*, 200 U. S., 472, 50 L. Ed., 561, as opposed to it.

We think that case is an argument in our favor. There a bill in equity was filed for the purpose of recovering the value of certain timber alleged to have been wrongfully cut from lands of the United States and converted to the use of the defendants. The demurrer interposed was sustained on the ground that the Court had no jurisdiction in equity as plaintiff had an adequate remedy at law, and the bill dismissed. When the case reached the Circuit Court of Appeals for this Circuit, the decree of the lower Court was sustained on the ground that the bill really set forth a series of trespasses, and displayed no equitable

characteristics, there being no *fiduciary* relationship, *no insolvency* alleged and *no identification of the proceeds* of the timber stolen.

In this connection this Court refers to the cases of *Newton vs. Porter*, 69 N. Y., and the *American Sugar Refining Co. vs. Fancher*, 145 N. Y., 552, 40 N. E., relied upon by us in our opening brief and distinguishing those cases say they—

“are cited to sustain the doctrine that such a trust may arise through a *tort*. In the first of these cases it was held that the owner of negotiable securities stolen and afterwards sold by the thief might follow and claim the proceeds in the hands of the felonious taker and that this right attached to any securities or property in which the proceeds may have been invested, so long as such proceeds could be traced and identified. But in that case the original *tortfeasor was insolvent*. *There was no remedy at law. No redress was possible unless the owner could proceed in equity to charge with a trust the property in which the stolen securities were invested*. So in the case of the *American Sugar Refinery Co. vs. Fancher*, the sale of the personal property had been induced by fraud on the part of the vendee, and the property was by him sold to another. *The proceeds of the sale were specifically identified in the hands of the latter. Since the vendee was wholly insolvent it was held that a Court of equity had a remedy to reach such proceeds and apply them for the benefit of the defrauded vendor. No such facts are presented in this case. It is not alleged that any of the defendants is insolvent.*”

So, too, when the case reached the Supreme Court

of the United States the decree was also affirmed on practically the same grounds. That Court, referring to the two cases cited in the opinion of the Circuit Court of Appeals, said in showing that the Bitter Root case did not present the same state of facts:

"These cases, as will be seen upon examination, show that the plaintiff *had no remedy at law* and *he was able to fully identify the particular property into which the original property belonging to him had been converted* and which was in the hands of a voluntary assignee. It was a question of following the proceeds and accurately and certainly identifying them, which the Court held was necessary to permit of such following. *The defendants were also insolvent.* . . . There is no pretense in this case that any specific piece of property was in fact either the same timber or the proceeds of the timber wrongfully cut and disposed of by the defendants or any of them. . . . On the contrary it was alleged in the bill that the complainant *was unable to show just when or by whom the cutting had been performed or the logs manufactured into lumber had been sold.* . . ."

All of the elements lacking in the Bitter Root case are found alleged in the case at bar.

Counsel for appellee, in their supplemental brief, make the point that because we alleged appellant was not an inhabitant of Alaska, the provisions of Sec. 1316 of the Compiled Laws of Alaska are applicable. Therefore that appellee failed to object to the jurisdiction of the Court below because of the fact that

he owned the property in controversy, which was there in the District.

Whatever right appellant had to object to the jurisdiction of the Court, he waived by his appearance by demurrer.

Section 1331, Compiled Laws of Alaska.

Insofar as his action was controlled by the fact that the Court would have jurisdiction because of the presence of his personal property in the District, and the admission of his ownership by us because of the allegation referred to in our bill, we have no quarrel. We are willing to concede his legal ownership of the funds in the possession of the Clerk, which as we assert is for all the purposes of the action, the possession of the appellee himself. What we are asking is not a determination of whether appellee has the legal title or not to this property. That he has may be admitted. We ask that those funds be declared trust funds to which appellant is equitably entitled by reason of the fact that they constitute the *proceeds* of appellant's stolen property and to which trust funds a lien has attached to the extent of the value of those stolen properties. To the extent of that value the equitable title of the said proceeds should be deemed to be and is in the appellant.

As we said in opening, we are not here seeking, upon the sufficiency of proof, upon pleadings and evidence, to establish our equitable title to these funds,

but endeavoring to determine whether the allegations of the bill deemed admitted by the demurrer are sufficient to set up such a constructive trust as will enable us to go further and prove our equitable title to these proceeds.

We submit upon the allegations of the bill we are entitled to the relief prayed for and ask a reversal of the decision of the Court below.

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